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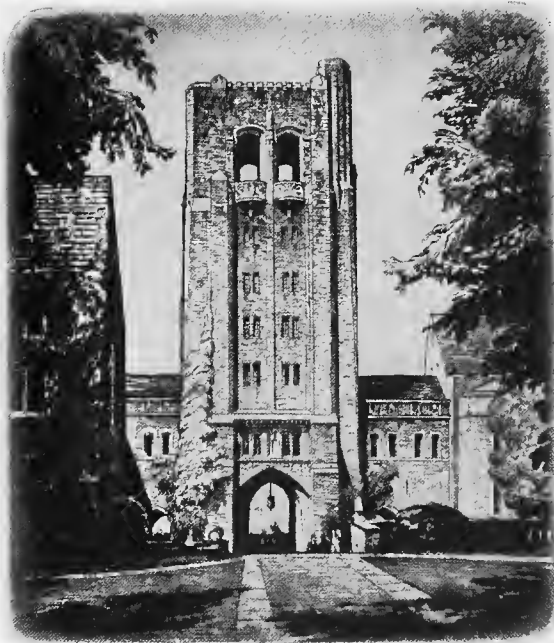
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ROBERT CAMPBELL, M.A.,
Of Lincoln's Inn, Barrister-at-Law, Advocate of the Scotch Bar.

ASSISTED BY OTHER MEMBERS OF THE BAR.

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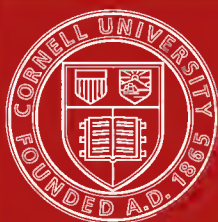
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A TREATISE
ON
POSSESSION OF LAND,

WITH A CHAPTER ON THE
REAL PROPERTY LIMITATION ACTS
1833 AND 1874.

BY
JOHN M. LIGHTWOOD,
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PREFACE.



THE object of this Work is to state the nature and legal effects of possession of land according to the present English law, and, as a means thereto, it deals with the learning of possession both in the Roman law and in the former English law.

So far as relates to the nature of possession and to the acquisition and loss of possession, this reference to Roman law requires no justification. Notwithstanding the differences between the two systems, no writer on possession in English law can afford to neglect the work of the Roman jurists and of their modern commentators. Among such commentators two are pre-eminent, Savigny and Ihering. Savigny's treatise remains unrivalled as a systematic exposition of the Roman law of possession, but on various points—notably in regard to the *animus domini*—Ihering has vigorously attacked it; and his views, founded as they are on considerations of the practical working of the law, are well worthy of attention. I have accordingly made frequent reference to both these authorities.

In treating of possession it is necessary to distinguish between the mere fact of possession and such possession as the law recognizes for civil purposes; and to avoid any chance of confusion, I have endeavoured always to describe the possession under consideration as either actual or civil possession. Actual possession is a matter which the lawyer may attempt to define,

but upon which it is not for him to decide. In the language of English law, it is a question for the jury. But civil possession does lie within his province. However the fact of possession may be determined, the law has still to say to whom the legal advantages of possession are to be ascribed, and in doing this it may sever the civil from the actual possession. Such severance takes place more readily in the English law, where the civil possession may depend on title, than in the Roman law, where the question of title is excluded.

In regard to possessory procedure—the remedies which are given for the protection of possession—I have attempted a comparison between the Roman and the English law, and I have also attempted to show the connection between the present action for the recovery of possession of land and the old real actions. The inquiry has led me somewhat far from the domain of practical law, but I hope the result will be found useful. The Roman law, with its marked distinction between ownership and possession, and its limited range of possessory remedies, forms a useful contrast to English law. In English law, possession, in the form of seisin, is the foundation of a right of possession which is equivalent to ownership as against strangers, and for the assertion of this right an extensive system of possessory remedies was devised. It was an incident of the system that the possessor might be protected against the true owner, and, since ejectment also was possessory, the same result was possible after ejectment had come to be substituted in practice for the possessory real actions. It was not till 1833 that the owner's right of entry was fully recognized.

Till recently it would have been sufficient to base the right of possession on seisin alone, and it would have been safe to say that, while mere possession was protected in trespass, it was not the foundation of a right of possession in virtue of which a plaintiff could recover in ejectment. But the decision of the Court of Exchequer, in *Davison v. Gent*, renders it necessary to discover some ground upon which mere possession can be regarded as giving a title in ejectment, and I have ventured to make the suggestion that the change effected by the Real Property Limitation Act, 1833, in the nature of adverse possession under the statute, has produced a corresponding change in the nature of the possession which is the foundation of the right of possession. In other words, any possession in favour of which the statute is running is the foundation of a right of possession such as that which arose upon an adverse possession, or a disseisin, under the old law. This is in accordance with the present tendency of the law, which is to pay regard to dispossession rather than technical disseisin, and it secures for possession the necessary measure of protection without interfering with the principles of the action of ejectment.

With regard to the acquisition of ownership by possession, it is unnecessary to refer to the Roman law further than to show that the rules of usucapion and prescription are quite inapplicable to English law; but it is instructive to ascertain how title was acquired under the old Statutes of Limitations. Such an inquiry forms a useful introduction to the consideration of the Real Property Limitation Acts, and I have devoted a chapter to it. I have also in this connection given a full account of the great case of *Cholmondeley*

v. *Clinton*. The Real Property Limitation Act, 1833, rendered that case unnecessary as an authority on the point immediately decided, but the arguments and the judgments may still be studied with profit.

The Real Property Limitation Acts I have discussed in a chapter of some length. My object has been, without entering into any great detail, to state in a compact and convenient form the principles which govern the operation of the Acts.

The text of the book shows the obligation I am under to Sir Frederick Pollock and Mr. Justice Wright's work on Possession in the Common Law, and to Professor Maitland's articles on Seisin in the "*Law Quarterly Review*."

I am indebted to Mr. W. M. Fawcett, of Lincoln's Inn, for much valuable advice in the course of the preparation of the Work, and for his kindness in reading the proofs as the Book was passing through the press. I have had the advantage of his wider experience, and the text has been greatly improved in consequence of his suggestions. I am glad to take this opportunity of acknowledging my obligation to him.

The substance of Chapter VII., on the Statutes of Forcible Entry, has appeared in three articles contributed to the "*Solicitors' Journal*" in October, 1893. I am obliged to the proprietor for his courtesy in permitting me to use it here.

JOHN M. LIGHTWOOD.

LINCOLN'S INN,
September, 1894.

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POSSESSION OF LAND.

CHAPTER I.

CIVIL POSSESSION.

THE law of property is based upon the two conceptions of ownership and possession. Ownership is a right, or, more strictly, a collection of rights, and it carries with it the right to possess (*jus possidendi*), a right which can be enforced by the owner, or by a person deriving title under him, against all the world. This refers to absolute ownership, the *dominium* of Roman law, and, so far as land is concerned, to a lawful seisin in fee in English law. In English law there may also be a tortious seisin in fee which carries with it, as against strangers, all the rights of ownership, including the right to possess, though not as against the true owner. Possession is a matter of greater difficulty, and it has sometimes been doubted whether it is a fact or a right. Primarily possession is a fact, but mere possession frequently secures for the possessor a certain measure of legal protection, and hence it becomes the source of a right known as the right of possession (*jus possessionis*). The exact nature of this right depends on the remedies granted for violations of it, and can only be stated after examination of those remedies. It is sufficient at present to say that in the Roman law, and in the English law down to 1833, it might exist against the true owner, and hence the contrast between the right of

The right
of posses-
sion.

possession and the right of property. Since 1833 it has only been possible for it to exist against strangers. Moreover, possession, in addition to attracting legal protection, and so becoming the source of the right of possession, may under suitable circumstances have the further consequence that, in course of time, the right of the true owner is extinguished and the right of possession is transformed into ownership.

Actual
and civil
possession.

But the fact of possession does not always determine the legal incidents of possession. Possession which is recognised by the law, whether for the above or any other purposes, is known as civil possession, and although ordinarily the actual and the civil possession coincide, yet the civil possession, and with it the advantages of possession, may be ascribed to a person who has no actual possession. This happens in two classes of cases. The actual possession may be held by another on behalf of the civil possessor—by his servant or tenant, for example—and here the civil possession is still based on actual possession. Or there may be no connection at all between the civil and the actual possession, as where the actual possession is vacant, or is in dispute, or even where it is held adversely by another. Thus a civil possession, founded in the first instance on actual possession, may continue after the actual possession has come to an end, whether by mere loss of control over the thing or by the intrusion of a stranger. And so, too, before any actual possession has been acquired, civil possession may be recognised as existing; where, for example, the actual possession being in dispute between two persons, the civil possession is ascribed to the one who has the better title; or where, upon the death of the possessor, the civil possession is ascribed immediately to his heir. These general remarks hold good in different degrees both of the Roman and the English law.

In the Roman law this distinction between actual possession and possession in the technical sense—we might say, between possession in fact and possession in law, but that the latter expression conveys the idea of a possession separated from possession in fact, a possession, that is, merely in law—was well established. “*Possessio*,” says Papinian (D. 41, 2, *de poss.*; 49 Pap. 1), “*non tantum corporis sed et juris est.*” And the two ideas were ordinarily denoted by the expressions “*in possessione esse*” and “*possessio.*” “*Aliud est enim possidere, longe aliud in possessione esse.*” (*Ibid.*; 10 Ulp. 1.) Frequently, also, the jurists have recourse to the adjectives *civilis* and *naturalis*, though in the use of them they are not quite consistent. In general, *possessio naturalis* corresponds to *in possessione esse*. What a slave holds, says Javolenus, as a part of his *peculium*, is to be regarded as possessed by his owner, because “*servus civiliter quidem possidere non posset, sed naturaliter tenet.*” (*Ibid.*; 24 Jav.) A slave, that is, could not possess so as to gain for himself the civil advantages of possession, though he might be the actual possessor. According to this distinction *possessio civilis* must be taken to denote the possession which can claim the protection of the interdicts; and when in union with it there exist also the attributes of good faith (*bona fides*) and lawful title (*justus titulus*), we have the possession which could ripen into ownership by usucapion. Sometimes, however, *possessio civilis* seems to have denoted possession of the latter kind only, and then, in contrast to it, *possessio naturalis* was used of interdict possession. (D. 43, 16, *de vi*; 1 Ulp. 9; and see the matter discussed by Savigny, Possession, Sir Erskine Perry’s Translation, 38.) But this is merely a question of nomenclature. The important point is, that the possession recognized by the law (*possessio civilis* or *possessio* simply), to which were ascribed the

advantages either of protection and usucapion, or of protection alone, was distinguished from actual possession (*possessio naturalis, in possessione esse*). It is sometimes convenient to denote this actual possession by the term "detention" in the case of goods, "occupation" in the case of land.

Separation
of civil
and actual
possession.

The separation of the civil from the actual possession occurred chiefly where the actual possession was held on behalf of a person claiming as owner by one either deriving title under him, or acting as his agent; for, in general, the Roman law allowed civil possession only to the person who claimed to be the owner. The tenant of land, the bailee of goods, were *in possessione* merely, and could not make use of the interdicts. (D. 41, 2, *de poss.*; 19 Marc. *pr.*; 43, 16, *de vi*; 1 Ulp. 10; 43, 17, *uti poss.*; 3 Ulp. 8.) Where the claimant was in possession neither by himself nor by a person representing him, he could not, as a rule, be credited with the civil possession. Thus, there was no doctrine that in cases of disputed possession the possession followed the title; or that, upon the death of the possessor, the civil possession devolved upon his heir. In the case, however, of the entry of a stranger during the absence of the possessor, although he gained actual possession, the former possessor retained the civil possession until he had notice of the intrusion, and failed to effect a re-entry.

Possession
in English
law.

In English law civil possession takes two forms, seisin and possession, and the legal advantages of possession are divided between the two. As to the protection of possession—that is, the granting of possessory remedies—it is necessary to distinguish according as the object of the remedy is to maintain or recover possession. The action of trespass, which is ordinarily for the maintenance of possession, is founded upon possession merely. The old possessory actions, which were for the recovery of posses-

sion, were founded upon seisin. The modern action of ejectment, too, is in strictness founded upon seisin, and the plaintiff must prove his title to the freehold or to an interest under the freeholder. But there is authority for saying that it lies in favour of a mere possessor who has been forcibly dispossessed. As to the acquisition of ownership by lapse of time, this effect was formerly ascribed only to seisin. To make the Statute of Limitations run, there must have been a possession adverse to the title of the true owner, and, practically, this meant that the owner was disseised, and that a fresh seisin had been acquired by the possessor. Now, however, the law is different. Adverse possession in this sense is not required. Definite rules have been established for fixing in most cases the date when the owner's right of entry is to be deemed to have accrued, and when, therefore, the statute begins to run; and although a person in whose favour the statute is running is frequently seised, he may acquire the ownership on mere possession unaccompanied by seisin. This happens, for instance, in the case of a tenant at will who has occupied for more than a year without renewal of his tenancy, or a tenant for years who holds over after the expiration of his term.

The separation between civil and actual possession, and the circumstances under which this may take place, are illustrated by the doctrines and nomenclature of seisin. Like the *possessio* of the Roman law, seisin is ascribed only to a person who possesses as owner (cf. *Davies v. Lordes*, 1838, 5 Bing. N. C. p. 173)—in the language of English law, as freeholder—and it is ascribed to him, whether he is himself in possession, or whether a tenant is in possession on his behalf. In either case the seisin is based upon actual possession, and it is a seisin in deed as opposed to the seisin in law presently to be mentioned. “Seised,”

Seisin in
deed and
in law.

POSSESSION OF LAND.

says Lord Coke (Co. Litt. 243 a), is where a man is “actually seised, either by entry, or by the possession of his lessee for years or the like.” But seisin by no means requires the existence of an actual exclusive possession as its basis. Entry upon land by a person entitled to the freehold immediately vests in him the seisin—that is, the actual seisin, the seisin in deed—although a stranger is in possession whom he has not succeeded in excluding. (Litt. s. 417.) And formerly an actual entry, an entry in deed, was not essential. If a man dared not enter for fear of injury, it was sufficient for him to go as near the land as was feasible and make his claim. This was an entry in law, and effectually vested the seisin in him. (Litt. s. 419; Co. Litt. 253 b.) And when seisin has once been acquired, the law favours alike its continuance in the person seised, and its devolution upon his heir. He may be deprived of it by disseisin, but disseisin is a fact which is not readily presumed; and upon his death, if he is then seised and no stranger enters, the law ascribes seisin at once to the heir. Where the possession is vacant, this is termed a seisin in law (Litt. s. 448); where, however, a tenant is in possession it is a seisin in deed. (Co. Litt. 15 a, 243 a; *Goodtitle v. Newman*, 1774, 3 Wils. 516; *Bushby v. Dixon*, 1824, 3 B. & C. 298; *Tuthill v. Rogers*, 1844, 1 Jo. & Lat. p. 76; *Lyell v. Kennedy*, 1889, 14 App. Cas. p. 456.) In the same way in the case of a devise, seisin in law is ascribed to the devisee before entry. (Co. Litt. 111 a.) Where the person dying seised had a particular estate, seisin in law is ascribed to the remainderman. But in the case of alienation no seisin vested in the alienee by the mere grant or feoffment. The transfer had to be completed by livery of seisin, and the transferee became thereupon seised in deed. If upon a feoffment without livery the feoffee entered, he took no freehold estate, but

became tenant at will to the feoffor. (Litt. s. 70; *Doe v. Cleveland*, 1829, 9 B. & C. p. 871.) In the case of a conveyance by fine, indeed, Lord Coke considered that the conusee got at once a freehold—that is, a seisin—in law. (Co. Litt. 266 b.) But the opinion is based on the notion that a fine operated as a feoffment of record, a view of the nature of a fine which was disputed by Willes, L.C.J., in *Smith v. Packhurst* (1741, 3 Atk. p. 141; see argument in *William v. Thomas*, 1810, 12 East, p. 147). By 8 & 9 Vict. c. 106, s. 2, formal livery of seisin was rendered unnecessary, and now a grant of a freehold interest by deed, followed by entry, effectually vests the seisin in the grantee.

When we come to possession, by which is to be understood the possession which is protected in trespass, we still find the civil possession upon occasion separated from the actual possession, but there is a greater tendency to make the two coincide. Except where possession is held by a servant, the civil possession is ascribed to the actual possessor; and it is not capable of devolution on death or of assignment *inter vivos*. The heir cannot maintain trespass till entry (Com. Dig. tit. "Trespass," B. 3), though then, under the doctrine of trespass by relation, he can recover damages for trespass previously committed; and, similarly, as to an executor. And although for some purposes a *cestui que use* under the Statute of Uses is held to be in actual possession (*Heelis v. Blain*, 1864, 18 C. B. N. S. 90; *Hadfield's Case*, 1873, L. R. 8 C. P. 306), yet this is not a possession in respect of which, without actual entry, he can maintain trespass. (*Geary v. Bearcroft*, 1667, Carter, 57.) So, again, although in *Walker v. Reeves* (1782, 2 Doug. 461 n.) Lord Mansfield said that by the assignment of a term, the title and possessory right passed, and the assignee became possessed in law, yet it is clear that, before he has entered, he cannot maintain trespass. (Cf.

Possession
for
trespass.

Cook v. Harris, 1699, 1 Ld. Raym. 367.) On the other hand, where there is a dispute as to possession, and neither party can be said as against the other to have actual possession, the law ascribes the civil possession to the one who has the better title. And further, when civil possession has once been obtained, it appears that the law, as a general rule, regards it as continuing, whether or no there is actual possession, until it is definitely put an end to, as by abandonment or dispossession.

Constructive possession of goods.

It has just been mentioned that the assignee of a term, although he is said to be possessed in law, has no possession in respect of which he can maintain trespass. With respect to goods the law is less exact, and the property in the goods, provided it is accompanied by an immediate right to possession (*Ward v. Macauley*, 1791, 4 T. R. 489), is said to draw after it the possession. The owner has a constructive possession in virtue of which he can sue in trespass. (*Smith v. Miller*, 1786, 1 T. R. at p. 480; cf. Blackburn on Sale, 2nd ed. 333.) But "possession in law," or "constructive possession" of this kind has no part in the theory of possession proper. It is simply a means of conferring on the person entitled the right to sue as though he were actually in possession. In other words, it gives him the benefit of possessory remedies. (Pollock & Wright on Possession, 25, 27, 145.)

CHAPTER II.

THE NATURE OF CIVIL POSSESSION.

POSSESSION, it is ordinarily said, consists of two elements, an element of physical control and an element of intention; and both must be present at the commencement of possession. *The elements of possession.* “*Apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.*” (D. 41, 2, *de poss.*; 3 Paul. 1.) These two elements constitute the state of actual possession. (Cf. L. Q. R. Vol. VI. 261.) Mere casual control is not sufficient. There must be physical control, and also an intention to possess. A vagrant who spends the night in an empty house is not in possession of the house, nor is a customer who takes up a ring in a jeweller’s shop for the purpose of examining it in possession of the ring. But Savigny makes a special use of the element of intention, and he distinguishes civil from natural possession by saying that for civil possession there must be an *animus domini*, an intention to possess as owner. Ihering, on the other hand, affirms that the nature of the intention is not material, and that civil possession depends on the character in which the possession is held. Actual possession, he says, is always taken to be civil possession, unless there is a *causa possessionis* such as to exclude civil possession.

This latter theory appears to adapt itself more readily than Savigny’s to the facts of the Roman law, and it is approximately correct in regard to English law. Seisin is in general credited to the actual possessor, unless it appears that he holds in some character which is incompatible with

seisin. He cannot be seised, for instance, if he is tenant for years. Possession for trespass is credited to the actual possessor, unless he holds in the character of servant. Seisin, however, is not merely civil possession; it implies a title as owner, *de facto* at least if not *de jure*, and if it appears that the seisin in fee—that is the legal estate—has been in a third person, from whom it has not been got in by conveyance or otherwise, the possessor is not seised unless he can establish a disseisin, and for this purpose he must show an intention, express or implied, to hold adversely to the former freeholder. Practically this is Savigny's *animus domini*. But for the purpose of a general statement of the nature of possession, it is convenient, and perhaps sufficiently accurate, to say that actual possession is deemed to confer civil possession—whether *possessio*, seisin, or trespass-possession—unless the possessor holds in a character which disqualifies him. Remembering then that actual possession depends on the two elements of physical control and intention, there are three points to be considered—physical control, intention, and the character in which the possession is held.

1. THE ELEMENT OF PHYSICAL CONTROL.

Control by
acts of
owner-
ship.

The physical element in possession consists in the exercise of control by the possessor to the exclusion of other persons. There are thus two sides to it, a positive and a negative side. This is recognised by Savigny, who defines the physical element as “the physical power of dealing with the subject immediately, and of excluding any foreign agency over it” (Poss. 147); but the definition is in each part open to criticism. An immediate power of dealing with the thing is a necessary but not a sufficient test of possession. A man who sees a jewel lying on the ground

has the immediate power of dealing with it; but till he has exercised that power there is no possession. Every passer-by has the power of using a piece of vacant land, but it is only he who enters and does use it who gains possession. The power of dealing with the thing only confers possession when such power has been exercised, or in some way made manifest, and inasmuch as the person exercising such power is ordinarily the owner, we have the practical rule that possession is shown by the exercise of acts of ownership. This is recognised in the Code, where the expression "*omnia ut dominum gessisse*" is used to explain the meaning of *in possessione* (C. 7, 32, *de poss.* 2; cf. Pollock & Wright on Poss. 30); and it is at the root of Ihering's explanation of possession as the realization of ownership. ("*Thatsächlichkeit des Eigentums*," *Grund des Besitzes-Schutzes*, 2nd ed. 179, 193.)

Moreover, as to the latter part of Savigny's definition, it has been objected that the requirement of a power to exclude foreign agency goes too far. It is sufficient if no foreign interference has in fact taken place. "It is not necessary," says Windscheid (*Pand. Rechts.* 2nd ed. sect. 153, n. (3)), "that the possessor should be more powerful than any stranger who may desire to appropriate the thing for himself, but that at the present moment no foreign power should exclude his own." Mr. Justice Holmes attempts to supply the necessary qualification by saying that the power of exclusion must be manifested. "We must bear in mind that the law deals only, or mainly, with manifested facts; and hence, when we speak of a power to exclude others, we mean no more than a power which so appears in its manifestation." (*Common Law*, p. 234.) And he instances the case of a powerful ruffian being within equal reach and sight when a child picks up a pocket book. "If he does nothing, the child

Power of
exclusion.

has manifested the needful power as well as if it had been backed by a hundred policemen." But it may be doubted whether the child has manifested any power of exclusion at all. He acquires control of the pocket book before the ruffian interferes, and it seems better to rely upon this actual absence of interference, than to mention a power of exclusion which inevitably suggests power to exclude in the future.

The physical element in possession may be said then to consist, positively, in the exercise of control by the possessor, and, negatively, in the exclusion of others. Control is shown by acts of ownership, and in ascertaining whether in any given instance possession of land can be proved, we must inquire (1) whether the alleged possessor is exercising suitable acts of ownership; (2) whether other persons are excluded. We are speaking now of the mere fact of possession, apart from any question of the continuance or transfer of a possession once established.

(i.) *Acts of Ownership.*

Acts must
be suitable
to the
land.

Acts of ownership are such acts as would ordinarily be done by an owner in possession, and they vary according to the nature of the land. "By possession is meant possession of that character of which the thing is capable." (Per Lord Fitzgerald, in *Lord Advocate v. Young*, 1887, 12 App. Cas. p. 556; Pollock & Wright on Poss. 31.) Hence, acts of slight importance, such as the gathering of sea-weed, the taking of shell-fish, and the planting of stakes for fishing-nets, are often conclusive in claims founded on the alleged possession of foreshore. This seems to be the case, however, only in favour of persons who, by reason of ownership of the adjacent land, may probably be entitled to possession. It is a question of the boundaries of the manor abutting upon the sea-shore.

Persons having no such probable title could, it is conceived, only gain possession by substantial acts of ownership, such as the erection of buildings or the reclamation of the shore.

Acts of ownership done on one part of a defined area are evidence of possession of the whole, provided the locality is such that it is a reasonable inference that the owner of the one part is the owner of the whole. "Ownership," said Parke, B., in *Jones v. Williams* (1837, 2 M. & W. p. 331), "may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did." In *Lord Advocate v. Lord Blantyre* (1879, 4 App. Cas. p. 791), Lord Blackburn referred to Baron Parke's statement of the law with approval, and observed:—"All that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if [the claimants] possessed one part as owners they possessed the whole." (Cf. *Wild v. Holt*, 1842, 9 M. & W. 672; *Bristow v. Cormican*, 1878, 3 App. Cas. p. 670; *Clark v. Elphinstone*, 1880, 6 App. Cas. p. 170.)

The inference will easily be made when the acts are done within an inclosed area. "In ordinary cases to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference

Area of
possession.

Ascertain-
ment of
area.

that the other belongs to the same person." (Per Parke, B., in *Jones v. Williams*, *supra*; cf. *Tyrwhit v. Wynn*, 1819, 2 B. & Ald. 554.)

And so where the acts of ownership themselves map out an area. In this manner an irregularly shaped piece of foreshore was held by the House of Lords to be parcel of a manor in *Attorney-General v. Emerson* ((1891) App. Cas. 649, but the facts on this head are not reported). But the land may be merely defined physically, as where it is woodland, the acts being done in some part of the wood (*Stanley v. White*, 1811, 14 East, 332); and the possession of inclosed land has been held to carry with it possession of an adjoining uninclosed wood. (*Penn v. Preston*, referred to in Bigelow's Leading Cases on Torts, 356.) Where land is held under a documentary title, a different principle comes in, and, if the title is good, the possession may be co-extensive with it. Hence possession of part of the mines comprised in a lease gives possession of the whole. (*Taylor v. Parry*, 1840, 1 Man. & Gr. 604.)

(ii.) *Exclusion of Others.*

Possession
must be
exclusive.

Not only must the alleged possessor exercise acts of ownership over the land, but other persons must be excluded. *Plures eandem rem in solidum possidere non possunt* (D. 41, 2, *de poss.*; 3 Paul. 5; cf. Sav. Poss. 112). In English law, however, the rule only requires that there should be no other person exercising acts of ownership or claiming possession adversely to the possessor. Two persons may jointly exercise acts of ownership, and they may thus gain a possession which vests in them an estate as joint tenants (*Ward v. Ward*, 1871, L. R. 6 Ch. 789; cf. Litt. s. 311); but in such a case there is really only one possession, and the possessors enjoy together the rights which flow from it. It is different where there are two

persons on land, each claiming possession independently of the other, and then neither can acquire actual possession without excluding the other (cf. Holmes, Common Law, 235, referring to *McGahey v. Moore*; *Barnstable v. Thacker*, Big. L. C. in Torts, 353).

The question whether foreign interference is to be deemed to be in fact excluded is somewhat more difficult in the case of land than of goods. In the case of goods, as a rule both the original act of appropriation and the existing custody are such as obviously to exclude others, but with land it is different. The possessor may be absent from the land, and other persons may be upon it. The practical rule appears to be that the area of the alleged possession must be marked out, and that there must be an habitual observance of its limits by the world at large. (Cf. Pollock & Wright on Poss. 13.) Ordinarily, as just stated, the area of possession is marked out by means of fences or other actual barriers which are themselves likely to keep away intruders. Inclosure is the strongest possible evidence of adverse possession. (*Seddon v. Smith*, 1877, 36 L. T. 168.) "If," said Bramwell, L.J., in *Coverdale v. Charlton* (1878, 4 Q. B. D. at p. 118), "there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common." But such methods of exclusion are not necessary (*Seddon v. Smith*, *supra*), and there may well be possession of an uninclosed tract of land, provided its area can be defined, and its limits have been in fact respected. On the other hand occupation, even of an inclosed space, is not sufficient to give exclusive possession, if the occupa-

Fact of
exclusion.

tion is merely temporary and occurs in the absence of other persons who are accustomed to use the premises. In *Revett v. Brown* (1828, 5 Bing. 7), the key of a chapel, in which different persons were accustomed to officiate, was delivered to the plaintiff that he might preach there. Afterwards he locked the chapel and refused to give up the key. The chapel was broken open by the order of the defendant. It was held that the plaintiff had not obtained a possession entitling him to sue in trespass. "If," said Park, J., "the plaintiff had enjoyed the constant and exclusive use of the chapel, the case might have been different; but the key was delivered . . . with permission to allow the plaintiff to preach, and many others preached there also. This was not sufficient evidence of possession to go to the jury."

Weight
of acts of
owner-
ship.

The principle that the exclusion of other persons must be habitual, and not casual merely, is of importance with reference to the weight to be attached to acts of ownership. These have a double effect. They not only show the actual control of the person doing them; they also tend to secure the exclusion of others, whether strangers or persons who, from the contiguity of their property, might be supposed to have adverse claims. But with regard to the latter class it cannot be said that they are definitely excluded by the mere exercise of acts of ownership of which they have no knowledge, unless, indeed, these involve the exclusive occupation of the ground in dispute. Hence, while as against mere strangers acts of ownership easily establish possession, as against persons interested to dispute them they are of less weight when done in their absence. (*Jones v. Williams*, 1837, 2 M. & W. p. 332.) "The weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being whether the act was such and so done that those who would be interested in disputing the ownership would be aware of

it." (Per Lord Blackburn, in *Lord Advocate v. Blantyre*, 1879, 4 App. Cas. p. 791.)

It follows from the principle in question that an occupation, or the exercise of acts of ownership, either of which by itself might be sufficient to establish possession, fails of this effect if it occurs in pursuance of a right which does not involve exclusive possession. The possession is in some other person who is actually present, or who will probably from time to time enter. In *Dean v. Hogg* (1834, 10 Bing. 345), the hirer of a steamboat was held to have no possession to justify the removal of an intruder, so long as the owner's captain and crew remained on the boat for the purpose of navigating it. (Cf. *Holmes v. Bagge*, 1853, 1 E. & B. 782.) And under various circumstances a man may be entitled to the occupation of a room or other place, while at the same time there is no such complete exclusion of the owner as to confer on him the exclusive possession. This is the case with regard to a guest at an inn (per Maule, J., in *Lane v. Dixon*, 1847, 3 C. B. p. 784), although he has a separate room; a passenger in a ship who has a separate cabin (*Smith v. St. Michael*, Cambridge, 1860, 3 E. & E. 383); and a pew-owner in a church, the possession of the church being in the parson (*Stocks v. Booth*, 1786, 1 T. R. 428; cf. *Allan v. Liverpool*, 1874, L. R. 9 Q. B. 180). And although the pasturing of cattle is an act of ownership from which possession may be inferred (*Lord Advocate v. Blantyre*, 1879, 4 App. Cas. p. 798), the inference is rebutted if it is shown to be done in exercise of a right of cattle-gate, not requiring exclusive possession. (*Rigg v. Earl of Lonsdale*, 1857, 1 H. & N. 923.)

The principle that possession must be exclusive is illustrated by the case of lodgers. (Cf. Clerk & Lindsell on Torts, 264.) Where the contract is merely for board and lodging, the lodger becomes an inmate of the house,

with no right to the exclusive occupation of any part of it. (*Wright v. Stavert*, 1860, 29 L. J. Q. B. 161.) If the contract is for the hire of particular apartments, it is necessary to inquire whether the duty of attending to them devolves on the occupier of the house. If so, his presence, or the presence of his servants for this purpose, prevents the occupation of the lodger from being exclusive. The question was considered and thus decided in *Smith v. St. Michael, Cambridge* (1860, 3 E. & E. 383), a rating case; and in the similar case of *Allan v. Liverpool* (1874, L. R. 9 Q. B. p. 191), Blackburn, J., after observing that occupation for rating purposes must be exclusive in the same sense as possession for trespass, said: "A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass *quare clausum fregit*, the maintenance of the action depending on the possession." (Cf. *Cory v. Bristow*, 1877, 2 App. Cas. p. 276.) Where, however, the lodger hires separate apartments and takes care of them himself, it appears that he has the exclusive possession. (*Lane v. Dixon*, 1847, 3 C. B. 776.)

Licencees. Similar considerations apply in distinguishing between a lease and a licence. For an instrument to operate as a lease it must confer a right to the exclusive possession of the premises. In *Taylor v. Caldwell* (1863, 3 B. & S. p. 832) the proprietors of pleasure gardens purported to let them for a series of concerts to be given on specified

days, themselves, however, providing bands and entertainments. It was held that they did not intend to part with the exclusive possession, and there was therefore no lease. A similar result followed in *Hancock v. Austin* (1863, 14 C. B. N. S. 634), where the owner of a factory let standing room for lace machines. The owner was to provide steam power, and he reserved to himself the right of entry for the purpose of attending to his machinery. Persons who occupy under such agreements occupy as licensees, and not as tenants. The distinction is sometimes used to assist the decision of rating cases. An agreement giving exclusive possession operates as a lease, and occupation under it makes the lessee liable to be rated (*Taylor v. Overseers of Pendleton*, 1887, 19 Q. B. D. 288). But an agreement under which the owner retains the control of the premises is only a licence, and he retains also the liability for rates. (*L. & N. W. Ry. Co. v. Buckmaster*, 1879, L. R. 10 Q. B. 70.)

On the other hand an owner, who reserves merely the right to enter and inspect, does not thereby retain possession, if the purpose for which he has given the use of the land does practically require exclusive occupation. In *Roads v. Trumpington* (1870, L. R. 6 Q. B. 56), it was agreed between A. and B. that A. should enter on B.'s land, and there dig for coprolites in a specified manner. There were no express words giving a right to the exclusive occupation of the land; but the excavations and works contemplated by the agreement required a constant occupation of the land by A. until the coprolites were raised. B. reserved to himself the right of going upon the land for the purpose of inspecting the works, but he was not required by the agreement to do anything upon the land. It was held that A. had exclusive occupation and was liable to be rated. And though the use of land for a limited purpose does not in general confer exclusive possession, it has,

Cases
of exclu-
sive pos-
session.

nevertheless, been in some cases held to give possession for trespass. The grantee of the *herbagium*, or *vestura terræ*, for instance, who has an exclusive right to enter upon the land for the purpose of taking the growing crop, may, after entry, maintain trespass. (Co. Litt. 4 b.; *Crosby v. Wadsworth*, 1805, 6 East, 602; cf. *Harper v. Charlesworth*, 1825, 4 B. & C. 574; *Dyson v. Collick*, 1822, 5 B. & Ald. 600.)

Exclusion
need not
always be
absolute.

But the requirement of absence of interference on the part of strangers is not to be pushed to an unreasonable extent, and in some cases, particularly in those relating to possession of foreshore, it is recognized that really exclusive possession is not in practice attainable. "In estimating," said Lord Watson, in *Lord Advocate v. Young* (1887, 12 App. Cas. 544), "the character and extent of [a riparian proprietor's] possession, it must always be kept in view that possession of the foreshore, in its natural state, can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the right."

2. THE ELEMENT OF INTENTION.

Savigny
and the
animus
domini.

The second element in possession is the intention of the possessor. The nature of this intention has been the subject of great controversy, especially among writers on the Roman law, but the difficulty seems to have been chiefly caused by the endeavour already noticed, to make the intention the test of civil possession. Savigny lent his support to the theory that the possessor must have an *animus domini*—an intention to possess as owner; and this does in general mark out the extent of civil possession in

the Roman law. The tendency was to allow such possession to those who possessed as owners, but to deny it to the tenant of land and the bailee of goods. In certain cases, however, possession was allowed to persons who held by a title inferior to ownership. To speak only of land, the tenant at will (*precario tenens*) and the tenant under a perpetual lease (*emphyteuta*) were recognized as having civil possession, although they had no intention of possessing as owners. To maintain the uniformity of his system Savigny explained these, and the similar cases as to goods, by the doctrine of derivative possession; by assuming, that is, that the owner was permitted to transfer to the tenant or bailee, not only the actual possession of the land or goods, but also the civil possession, while himself retaining the *animus domini*. It has been objected, however, that this is merely a fiction designed to conceal the fundamental error of his system. *Possessio* did not depend on an *animus domini*.

A theory more in accordance with the facts was suggested by Ihering, of whose work, *Der Besitzwille*, an account has been given by Mr. Bond. (L. Q. R. Vol. VI., p. 259.) Ihering saw that in practice the nature of the *animus possidendi* is no test of civil possession. Indeed, the element of intention rarely comes in question in controversies touching the possession. An intention to possess is a necessary element, but in general the intention sufficiently appears from the facts relied upon to show physical control. When such control is established, the civil possession does not depend on the nature of the intention, but, as stated above, on the character in which the occupier claims to possess, on the *causa possessionis*. Hence Ihering's rule that detention is to be taken to be possession—that is, civil possession—unless one of the *causæ* excluding possession is proved. Thus the tenant and bailee are refused

Intention
no suffi-
cient test
of civil
possession.

the protection of the interdicts, not from any defect in their intention to possess, but because the *causa possessionis* is one with which the law refuses to associate civil possession.

*Animus
possidendi.*

This leaves us at liberty to examine into the nature of the *animus possidendi* without being under the necessity of defining it in such a manner as to make it the test of civil possession. As we have seen, the element of physical control has two sides, the actual exercise of control and the exclusion of strangers. The required intention may in the same way be presented under two aspects—an intention to have physical control, and an intention to exclude strangers. The former is the *animus possidendi* of Roman law; but recent writers have preferred the negative aspect, and, notably, Mr. Justice Holmes replaces by it the *animus domini* of Savigny. The intent which the law requires, he says, is an intent to exclude others (Common Law, p. 220); though, he adds, this need not extend to the exclusion of the owner, for a bailee, who has no such intention, nevertheless has possession. “If a bailee intends to exclude strangers to the title, it is enough for possession under our law, although he is perfectly ready to give the thing up to its owner at any moment.” (*Ibid.*, p. 221.)

Intention
to exclude.

If this is taken as a test for civil possession in English law it goes too far. A servant or bailiff has an intention to exclude strangers to the title, but he has no possession for trespass. Mr. Justice Holmes (*ibid.*, p. 227) treats this case as an exception standing on purely historical grounds. Sir Frederick Pollock allows for it by altering the definition into an intention to exclude others “on one’s own account and in one’s own name.” (Pollock & Wright on Poss. p. 17.) For trespass-possession this is sufficient, but in dealing generally with forms of civil

possession, it is, perhaps, better to define the intention less strictly, and, in the manner suggested above, to look also at the character of the possession. The intention is simply an intention to possess, and has two sides corresponding to the two sides of the physical element in possession. It is an intention at once to exercise control and to exclude strangers, although sometimes one aspect, and sometimes the other is more prominent.

Intention to possess being thus one of the facts on which actual possession, and with it civil possession is founded, it follows that if from any cause it cannot exist, the civil possession is not complete. In the Roman law this circumstance is frequently remarked. An infant can only acquire possession when his lack of understanding is supplied by the sanction of his guardian (D. 41, 2, *de poss.* ; 32 Paul. 2) ; a lunatic can hold a thing, but he cannot begin to possess for want of intention (*affectio tenendi, ibid.* ; 1 Paul. 3) ; a municipality cannot possess, because its members, so it is said, cannot have a common intent. (*Ibid.* ; 1 Paul. 22.) But in the case of the infant, it was objected that possession is matter of fact, not of law, and Paulus allows that he may possess, if he is of an age to understand what he is doing. (*Ibid.* ; 1 Paul. 3.)

Cases where intention cannot exist.

The natural way to overcome difficulties of this kind is to allow the acquisition of possession by an agent to enure to the benefit of the principal, but, according to the theory of the Roman law, not only was a relation of agency or other proper relation, such as that of father and son, master and slave, necessary for this purpose, but the principal must himself also have an intention to possess, express or implied. (*Ibid.* ; 1 Paul. 5 ; 44 Pap. 1.) In other words, the physical control and a certain measure of intent (*intellectus possidendi, ibid.* ; 1 Paul. 9) are in the agent ; the real *animus possidendi* is assumed to be in the

Difficulty overcome by doctrine of agency.

principal. Ordinarily this is so. A man who directs his servant or an agent to accept delivery of a thing has the intention to possess, and this, together with the subsequent actual acquisition by the agent, forms a sufficient basis of fact to give rise to civil possession. But it seems better to regard the actual possession as depending solely on the control and intention of the servant or agent; and where the law refuses him the civil possession, this is ascribed to his master or principal on the ground that the servant or agent was acting within the scope of his authority. In practice the Roman law seems to have adopted this view. A slave could acquire possession in connection with his *peculium* for an infant or a lunatic (*ibid.*; 1 Paul. 5; 32 Paul. 2), and, according to one opinion, a municipality could acquire possession either by a free agent or a slave. (*Ibid.*; 2 Ulp.) In English law there is no difficulty in attributing the advantages of possession to the person for whom it is in fact held, without reference to any knowledge or intention in him. The possession of the tenant gives seisin in deed to the unknown heir (*Lyell v. Kennedy*, 1889, 14 App. Cas. p. 456), and the possession of the servant or bailiff enables his master to maintain trespass.

Evidence
of inten-
tion.

The existence of an intention to possess usually appears from the acts of physical control, and the character in which they are done. When a friend comes upon my land to visit me, the want of intention to possess is clear (D. 41, 2, *de poss.*; 41 Paul.); and so when an auctioneer enters for the purpose of selling the land or the fixtures upon it. (*Davis v. Danks*, 1849, 3 Ex. 435.) When a man enters under a lease it is equally clear that he does intend to possess. Hence, as already observed, the existence of the intention seldom comes into question. Sometimes, however, the character in which an entry is made or an act done is *primâ facie* doubtful, and the doubt

must then be removed either by express declaration of intention, or by substantial acts of ownership from which the intention can be inferred. "It is not necessary," said Tenterden, C.J., in *Butcher v. Butcher* (1827, 7 B. & C. p. 402), "that the party who makes an entry should declare that he enters to take possession. It is sufficient if he does any act to show his intention." Thus, where there is a tenancy at will, a mere entry by the landlord does not amount to a resumption of possession, so as to terminate the tenancy. He must do some act signifying his intention to have the land again under his control. (*Randall v. Stevens*, 1853, 2 E. & B. 641.) And a person exercising acts of ownership over land without title will not gain possession as against the owner, unless they are done with the intention of infringing the owner's right. (*Leigh v. Jack*, 1879, 5 Ex. D. per Cockburn, C.J., p. 271.)

As to movables, the requirement of intention does not appear to be so strict, and the person in whose house or upon whose land chattels may happen to be is, in the absence of any other possessor, readily credited with the possession of them. In such a case he has already the intention of excluding others from the house or land, and this general intention, it has been said, is sufficient to constitute *de facto* possession. (Pollock & Wright on Possession, 41.) At any rate, the existing exclusion of strangers from the place where the thing is may give possession in law of the thing, although the possessor is ignorant of its existence. (*Reg. v. Rowe*, 1859, Bell's C. C. 93; *Elwes v. Brigg Gas Co.*, 1886, 33 Ch. D. 562; cf. Holmes, Common Law, 223.) Some of the cases, however, which might be expected to illustrate this doctrine, depend on the rule that the right to possess draws after it a constructive possession, which is sufficient for trespass to movables, and hence the actual possession does not come in

As to
movables,
specific
intention
may be
dispensed
with.

question. This is so in the case of wrecks and estrays, where the lord of the manor or the Crown have a right to possession or a special property in the goods. (*Smith v. Miller*, 1786, 1 T. R. at p. 480; *Bailiffs of Dunwich v. Sterry*, 1831, 1 B. & Ad. 831.) And the ownership of the foreshore has been held to give the property in seaweed directly it touches the shore. (*Brew v. Haren*, 1877, 11 Ir. R. C. L. 198.) The Roman law adhered more strictly to theory, and required in the case of movables in houses or on land a specific intention. (D. 41, 2, *de poss.*; 3 Paul. 3.)

3. CHARACTER IN WHICH POSSESSION IS HELD.

Characters
excluding
possession.

When actual possession has been established by proof of the requisite physical control and intention, it is necessary further to have regard to the character in which the actual possession is held. Possession held in certain characters is civil possession; held in others it is not. Possession by an owner or a tenant at will in Roman law gave *possessio*; not so possession by an ordinary lessee. Possession by the freeholder in English law gives seisin; not so possession by a copyholder, tenant for years or otherwise, or bailiff. Possession by any person gives trespass-possession, unless he is a bailiff or servant. The general rule is that actual possession is taken to be also civil possession, unless held in one of the characters which exclude the particular civil possession in question.

Seisin.

In English law the ordinary ground for excluding the possessor from seisin is that he is merely a tenant, whether for years or otherwise. The possession of the tenant, it is sometimes said, is the possession of the landlord. (*Saunders v. Lord Annesley*, 1804, 2 Sch. & Lef. p. 98; *Archbold v. Scully*, 1861, 9 H. L. C. 380.) More correctly, the posses-

sion of the land is in the tenant; the seisin or possession of the freehold in the landlord. (*Berry v. White*, 1662, O. Bridg. 92.) The tangible mark of seisin under such circumstances is payment of rent under a lease, and seisin is proved, therefore, by the production of leases and proof of receipt of rent under them. (*Bristow v. Cormican*, 1878, 3 App. Cas. 653.) So it has been said that actual possession clothed with the receipt of the rents and profits is the highest instance of the equitable seisin which may exist when the legal estate is outstanding. (*Casborne v. Scarfe*, 1737, 1 Atk. 603.) Mere possession, however, is *prima facie* evidence of seisin in fee (*Peaceable v. Watson*, 1811, 4 Taunt. 17; *Asher v. Whitlock*, 1865, L. R. 1 Q. B. p. 6), though the presumption may be rebutted by showing an actual title in the possessor which excludes the freehold, and also, as pointed out above (p. 10), by proof that the legal estate is outstanding. (See *Doe v. Barnard*, 1849, 13 Q. B. 945.)

The case of trespass-possession presents no difficulty. Here the actual possession confers upon the possessor the civil possession also, save only where the actual possessor is a servant (*Bertie v. Beaumont*, 1812, 16 East, 33), or a person who is in the position of a servant and has no independent possession on his own account. (*White v. Bayley*, 1861, 10 C. B. N. S. 227; *Mayhew v. Suttle*, 1854, 4 E. & B. 347.) And, so long as the relation of master and servant is maintained, the servant has no possession in favour of which the Statute of Limitations will run as against the master. (*Moore v. Doherty*, 1843, 5 Ir. L. R. 449; cf. *Allen v. England*, 1862, 3 F. & F. p. 51, note.)

Possession
for
trespass.

CHAPTER III.

THE ACQUISITION AND LOSS OF CIVIL POSSESSION.

Change of
possession.

IT has been observed above that the civil possession is separated from the actual possession in two distinct classes of cases. The actual possession, although not held by the civil possessor, may nevertheless be held by some other person on his behalf. Separation of this nature has been illustrated by the instances referred to in the preceding chapter, where the possession has been regarded as in a state of rest. Although the civil and the actual possession are not united in the same person, yet they coincide in the sense that the civil possession is based on the actual possession. The actual possession is reckoned to the credit of the civil possessor. But a civil possession may be deemed to exist, although no actual possession is held by or on behalf of the civil possessor, and this ordinarily happens when the possession is in a state of change. Any change in the civil possession involves two inquiries. First, has there been a change in the actual possession, and secondly, has there been a corresponding change in the civil possession? It will be found that the change in the civil possession anticipates, concurs with, or lags behind the change in the actual possession. In the first case and the third, the civil possession is no longer based on the actual possession. Instances of this mode of separation will be found in the present Chapter.

Original
acquisition
of

Actual possession is gained so soon as exclusive physical control has been acquired with a suitable intention, and

thereupon civil possession at once results, either to the actual possessor or to some person on whose behalf he is acting. In some special cases, as in the customs of the whale-fishery referred to by Mr. Justice Holmes (Common Law, p. 212), the civil possession precedes the acquisition of actual possession—that is, possession is deemed to be acquired for legal purposes, although, as between contending claimants, no one of them has obtained exclusive control. It has been pointed out (Pollock & Wright on Poss. 45) that, so far as concerns land in this country, the original acquisition of possession is no longer of practical importance.

Change of civil possession from one person to another takes place either with or without the consent of the previous possessor. These are the two cases of delivery of possession and of dispossession, and in the latter case we must further distinguish according as the new possessor enters with or without title. In delivery of possession the change of actual possession is easily effected, and there is also a tendency for the civil possession to be credited to the new possessor even before any actual possession can be said to have been acquired by him. In entry under title the civil possession is in English law quite independent of a change in the actual possession. The person so entering acquires civil possession although the actual possession is still in dispute. In the Roman law, where the questions of possession and title are kept distinct, this case does not occur. In dispossession by a stranger, under which head is included disseisin, the tendency is the other way. The change of actual possession is less readily effected, and, when this has been accomplished, the change in the civil possession still lags somewhat behind. Each of these cases involves the loss of possession by one person and its acquisition by another, but in the first two, it is the

civil
possession.

Transfer
and ter-
mination
of civil
possession.

acquisition by the new possessor which is the more prominent feature, and it is this which fact and law alike assist; in the last, stress is chiefly laid on the loss by the old possessor, and in his favour the change is retarded as long as possible.

There remains the case of the termination of civil possession, where, that is, it is lost by one person, and not at the same time gained by another. This again raises the double inquiry, when actual possession is to be deemed to be lost, and whether this carries with it the loss of civil possession. The subject of this Chapter falls, therefore, under the heads of (1) delivery of possession, (2) entry under title, (3) dispossession (including disseisin), and (4) loss of possession. (Cf. Pollock & Wright on Possession, 44.)

1. DELIVERY OF POSSESSION.

Require-
ments of
delivery.

Of the two points in the physical element of possession—the manifestation of control by acts of ownership, or otherwise, and the exclusion of strangers—the latter is secured without difficulty on a delivery of possession. Provided there is *vacua possessio*—that no other person, that is, is present claiming the possession—all that is necessary is that the transferor should withdraw in favour of the transferee. Under such circumstances, not only is there an actual exclusion of strangers, but there is a probability that this will continue, and that the respect which was paid to the former possession will be paid also to the new. The new possessor, it has been well said, gets the “goodwill” of his predecessor’s occupation. (Pollock & Wright on Possession, 14.) The fact of exclusion being thus established, it is easy to give a favourable construction to the acts or circumstances manifesting actual control, and herein delivery of possession differs from

dispossession. "Delivery is favourably construed, taking is put to strict proof." (*Ibid.*) Acts of ownership are not required to show exclusion, but simply to manifest the new control. In the Roman law they might even be dispensed with, and delivery of land might take place without actual entry by the transferee. In English law entry is required, but an entry on part of an estate puts the transferee in possession of the whole. (*Post*, p. 207.) The matters calling for special attention are the requirement of *vacua possessio*, the manner in which the delivery is effected, and the area to which it extends.

The requirement of *vacua possessio* was formerly of importance in livery of seisin. According to some authorities it was essential that there should be no man, woman, or child at all on the land or in the house other than the grantor or grantee, but this was carrying the requirement too far. All that was really necessary was that there should be no other person claiming the possession, or representing a claimant to the possession. (*Doe v. Taylor*, 1833, 5 B. & Ad. 575.) And the requirement was dispensed with when a person who had right of entry wished to deliver seisin. An entry vested the possession in him, although an adverse claimant was on the land, and by virtue of this possession he could make livery of seisin. Nay, further, he might make livery within the view, and the feoffee might obtain seisin in deed by going as near the land as he dared, and making claim. "A livery in law," says Lord Coke, "shall be perfected and executed by an entry in law." (*Co. Litt.* 48 b.)

The question of *vacua possessio* arose when the land was in the occupation of a tenant for years, for since the feoffor, although he was seised, had no possession, he could not make that delivery of possession on which livery of seisin was based. (*Co. Litt.* 48 b.) To pass the seisin

*Vacua
possessio.*

Livery
during
tenancy.

there must have been a grant of the reversion followed by attornment on the part of the tenant. (Litt. s. 567.) Livery of seisin might, however, be effected with the assent of the tenant. (Co. Litt. 48 b.; Prest. Abst. II. 291.) And it could also be effected if the tenant and his family happened to be absent from the land. "If the lessee be absent, and hath neither wife nor servants (though he hath cattle) upon the ground, the livery of seisin shall be good." (Co. Litt. 48 b.) But the livery in such a case was ineffectual if the lessee was on any one of several closes in the same county included in the demise to him, "for the lessee cannot be upon every parcel of the land to him demised, for the preservation or continuance of his possession therein. And, therefore, his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole from being ousted or dispossessed." (*Ibid.*) While, however, the freeholder could not, as long as his tenant was in possession, deliver seisin, with the tenant it was different. He had the possession, and by making a feoffment and delivering the possession with the formalities of livery of seisin, could effect a disseisin of the freeholder, and vest the seisin in the feoffee.

Livery in
deed.

Livery of seisin was either livery in deed or livery in law. Livery in deed took place on the land, and in one form was modelled on the notion that delivery requires manual transfer of possession. Since with land this was impossible, something, whether connected with the land or not, was handed over as symbolizing the land. But this ceremony was not essential, and the livery might take place by words only. "A livery in deed may be done in two manner of ways. By a solemn act and words, as by delivery of the ring or hasp of the door, or by a branch or twig of a tree, or by a turf of the land, and with these or

the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the door, hasp, branch, twig, or turf; and the feoffor saying, Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the form and effect of this deed; or by words without any ceremony or act; as, the feoffor being at the house door, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed. . . . For if words may amount to a livery within the view, much more it shall upon the land. . . . The delivery of anything upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good, and so hath it been resolved by all the judges." (Co. Litt. 48 a.)

Livery in law took place in sight of the land and was turned into livery in deed by the subsequent entry of the feoffee. "A livery in law is, when the feoffor saith to the feoffee, being within view of the house or land, 'I give you yonder land to you and your heirs, and go, enter the same, and take possession thereof accordingly,' and the feoffee doth accordingly in the life of the feoffor enter." (Co. Litt. 48 b.) The above examples of livery in deed assume that there is a deed accompanying the feoffment, but this was a matter of custom and convenience, not of necessity. The seisin passed, whether by livery in deed or in law, without any charter of feoffment. (Co. Litt. 330 b, note (1); 48 b.)

In livery in deed the feoffee is on the land; in livery in law, he must complete his seisin by entry. In either case he obtains by his presence actual possession, and on this the seisin, the civil possession, is based. The Roman law went a step further with regard to livery within the view, and allowed the civil possession to vest at once in the

transferee:—" *Si vicinum mihi fundum mercato venditor in mea turre demonstret vacuamque se possessionem tradere dicat, non minus possidere cepti, quam si pedem finibus intulissem.*" (D. 41, 2, *de poss.*; 18 Celsus, 2.) But the requirement of actual entry to give civil possession is insisted on in the English law of seisin, and is further illustrated by the law of trespass. A lease for years created by deed takes its origin from the deed, and there needs no direct delivery of possession by the lessor to the lessee. (Litt. s. 59.) But at the time of the making of the deed the lessor must be in possession, and the lessee has no estate, but merely an *interesse termini*, until he enters. And until he has thus completed his possession he cannot maintain trespass. (*Ryan v. Clark*, 1849, 14 Q. B. at p. 73; *Harrison v. Blackburn*, 1864, 17 C. B. N. S. at p. 691.)

Area
included
in the
livery.

The circumstance by which a feoffee showed his actual possession of the land was, in a livery in deed, his presence on the land and acceptance of possession; in a livery in law, his subsequent entry. The effect of this may properly be extended to all land from which the feoffor withdraws, and which is commonly known, or may be reasonably supposed, to be in the same occupation. The old law purported to adopt the test of common knowledge, and assumed that all the men of a county were cognisant of what took place in the county. Hence a livery of seisin on one parcel of land was effectual to pass the seisin of all other parcels named in the deed, or specified in the livery, which were in the same county. (Co. Litt. 48 a; Litt. ss. 61, 418.) Where, however, the lands were in different counties, it was necessary in each county to have a livery of seisin. (Litt. s. 61.) "Forasmuch as the men of one county do not accompany together with men of another county at county courts, tourns, leets, and other courts, therefore in judgment of law they shall take no notice of

livery in another county to pass any lands in their own county." (Co. Litt. 50 a.) And as to all the lands that were included, the feoffee acquired a "possession and seisin in deed." (Cf. Litt. s. 418.) The distinction according to counties has now lost its meaning, but the principle remains the same, and probably a purchaser who enters under a deed, or a lessee who enters under a lease, acquires possession of all the lands comprised in the deed or lease which are so situated that it is a matter of notoriety or of reasonable supposition that they are in the same occupation. (Cf. *Jepherson v. Dryden*, Bigelow's L. C. on Torts, 356; *Low Moor Co. v. Stanley Coal Co.*, *post*, p. 207.)

At the present time the immediate freehold lies in grant. (8 & 9 Vict. c. 106, s. 2.) Hence formal livery of seisin is no longer necessary, and it has become practically obsolete. (Challis, Real Property, 2nd ed. 363.) But though it is possible that the grant passes a statutory seisin to the grantee, it does not seem that the grantee can become actually seised until he enters. Freehold
now lies
in grant.

In the case of goods it is possible to dispense more readily than in the case of land with actual appropriation by the transferee. Goods delivered at my house are in my possession, although I have not touched them (D. 41, 2, *de poss.*; 18 Celsus, 2); and so with regard to goods in the warehouse of another. They may be delivered by delivery of the keys at the warehouse (D. 18, 1, *de contr. emt.*; 74, Pap.); or, in English law, even away from the warehouse. This is sometimes said to operate as a symbolical delivery, a doctrine which assumes a change in the civil, not in the actual possession. But it seems correct to recognize a change in the latter also, and to base the transferee's possession on the circumstance that he has exclusive access to the goods. (See the cases collected and discussed in Pollock & Wright on Possession, pp. 60—70.) On Delivery
of goods.

the other hand, if others are not excluded, or if I have no access to the thing, the result is different. It has been held that the purchaser gains no possession of a machine which is sent to his premises on trial, and which is still subject to the control of the maker and may be removed by him if it is not satisfactory (*Phelps v. Willard*, quoted in Big. L. C. on Torts, p. 356); and where a locked box is delivered to me, and the key kept back, it seems that I have no possession of the contents. (*Reddel v. Dobree*, 1839, 10 Sim. 244.) Frequently, however, it is difficult to say who is the actual possessor of a chattel (Pollock & Wright on Poss. p. 6); and, for the sake of settling rights dependent on possession, it is necessary to ascribe the civil possession to the person who most nearly resembles an actual possessor.

2. ENTRY UNDER TITLE.

Possession
follows
the title.

Where a person who, as against the actual possessor, is entitled to the possession of land, enters in assertion of his title, he is deemed to acquire the possession, although he does not succeed in gaining effective occupation. In other words, as between two persons each upon the land, and each claiming to be in possession, the civil possession is ascribed to whichever of the two has the better title. "Where two men are in possession the law will adjudge it in him that hath the right." (*Reading v. Royston*, 1702, Salk. 423; Litt. s. 701.) In such a case the civil possession does not wait for the actual possession to be established. If neither has any title, the civil possession remains, like the actual possession, undetermined.

Acquisi-
tion of
seisin by
mere
entry.

With regard to seisin this principle has always been recognized. Where a man had right to enter upon lands, mere entry was sufficient to confer the seisin upon him (Litt. s. 418); and where the lands were in the hands of

a disseisor, entry by the disseisee upon any parcel gave seisin of all in the same county. But where there were several disseisors, or the land had been delivered by the disseisor to different persons, entry upon each of the persons so holding the land was required. (Co. Litt. 252 b.) And if the person entitled to enter was afraid to enter on the land for fear of injury, he might vest the seisin in himself by going as near to the land as he dared and making his claim. (Litt. s. 419; Co. Litt. 253 b.) To preserve the right of entry, continual claim, as this was called, had to be made every year and day.

The effect of mere entry and of continual claim has now been abolished (*post*, p. 265), but a substantial entry made by a person having right of entry still vests in him the possession for all purposes of law. The principle was stated by Maule, J., in *Jones v. Chapman* (1847, 2 Ex. p. 821), as follows:—"It seems to me that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser The question which of the two really is in possession is determined by the fact of the possession following the title, that is, by the law, which makes it follow the title." (Cf. *Butcher v. Butcher*, 1827, 7 B. & C. 402; *Hey v. Moorhouse*, 1839, 6 Bing. N. C. 52.) But the mere claim of title does not give civil possession—or, to adopt the common phrase, constructive

Acquisition of possession by entry.

possession—against those who show no title. It lies upon the person entering in assertion of his right to show that his title exists. (Per Lord Blackburn in *Bristow v. Cormican*, 1878, 3 App. Cas. p. 661.)

*Lows v.
Telford.*

The principle under consideration appears to account most satisfactorily for the decision of the House of Lords in *Lows v. Telford* (1876, 1 App. Cas. 414). Lows was entitled as mortgagee in fee to certain premises used for the storage of goods. Two persons, Westray and Telford, were in occupation by permission of the mortgagor. On the night of the 13th of July, 1870, the premises were locked up and left. Early on the following morning Lows went for the purpose of taking possession. He was accompanied by two men, a joiner and a carpenter. They opened the door, took the old lock off, and prepared to put on a new one. Westray then appeared and demanded admission, but was refused. Subsequently he effected an entry through a window, and having by that time procured the assistance of Telford and others, he drove Lows away from the door. Lows indicted Westray and Telford for a forcible entry, but they were acquitted. Then they took proceedings against him for malicious prosecution, and the question was raised whether Lows had obtained such possession against them as to bring the entry on him within the Statutes of Forcible Entry.

In the Exchequer Chamber it was thought that for this purpose an actual possession was necessary, and that such a possession had not been acquired by Lows. "It seems to me," said Keating, J., (*ibid.* at p. 423), "that in order to constitute possession it must be a complete possession exclusive of the possession of any other person, and here, I think, the facts show there was no such possession taken." In the House of Lords, Lord Cairns, C., took a different view as to the facts, and held apparently that

Lows had obtained actual possession—"not for any great length of time, but for a definite and appreciable length of time, [he] obtained and retained possession of the property"—though in arriving at this conclusion he relied also on the circumstance that he had a right to take possession. But the existence of a right to take possession cannot alter the fact of possession, although it is decisive of the civil possession. Lord Selborne avoided the difficulty by holding that the existence of civil possession was sufficient, and that Lows had acquired this by his entry under title. "If for civil purposes the legal possession was then in the appellant, the foundation for such a charge, so far as the state of possession is concerned, was sufficiently and properly established." The case, that is, was an instance of the rule in *Jones v. Chapman*. Whether or no Lows could be said to have gained actual possession, his entry under title at any rate vested in him the civil possession. The entry of Westray and Telford, therefore, was a forcible entry on an existing possession, and was indictable.

3. DISPOSSESSION (INCLUDING DISSEISIN).

In dispossession the change of possession is effected against the will of the existing possessor; hence the physical control of the new possessor must be manifested in such a manner as at once to establish his own control and exclude that of his predecessor. The new possession consequently extends only over so much of the land as is really brought within the exclusive control of the intruder, and there is no presumption in its favour, such as is allowed in the case of delivery of possession.

With regard to movables it has been said that a man who is not entitled to take possession can obtain possession

Actual
disposes-
sion.

Movables.

only of that which he actually lays hold of. (*Ex parte Fletcher*, 1877, 5 Ch. D. 809.) In *Furber v. Finlayson* (1876, 24 W. R. 370), a man who was sent to take possession of goods found the owner absent and the goods inside rooms, the doors of which were locked. He remained in an outer room from which he could command the locked rooms. It was held that since he could exclude the owner, he had gained possession of the goods; but the decision overlooks the double requirement of possession, actual control over the thing as well as the exclusion of others.

Land.

With regard to land, too, it is recognized that a person who is in possession without title can have no constructive possession beyond the limits of his actual occupation. (Cf. D. 41, 2, *de poss.*; 18 Celsus, 4; Pollock & Wright on Poss. 14; *post*, pp. 205—207.) Hence where a man having possession of the south end of a lot, but without title, cut timber on the north end of the lot, the whole of which he contended was in his constructive possession, it was held in an American case (*Aikin v. Buck*, quoted in Big. L. C. on Torts, 358) that he was liable to the owner in trespass. At the same time, where land has been enclosed or otherwise reduced into the possession of one person, any one subsequently in possession without title has the advantage of this actually established state of possession, and the limits of his possession may be determined accordingly. In another American case referred to by the same author (*Carey v. Buntain*, *ibid.* 357), it was held that a widow, remaining in the mansion house without title after the death of her husband, gained possession of the land within the enclosure of the house and grounds, though not of land outside the inclosure which had been held by her husband. The true principle appears to be that, while no presumption is made in favour of a wrongful possession, a fair interpretation must be given to the acts of the wrong-doer, having regard

to the state of the land, and the presence or absence of the existing possessor.

The change in the civil possession is based upon the change in the actual possession; but it does not follow that, when A. has been dispossessed by B., therefore A.'s civil possession has come to an end—that he is to be regarded as dispossessed for purposes of law. An interval is commonly allowed during which he may return and expel B.; and only when this interval has elapsed, and no expulsion has been effected, is the dispossession finally complete. Thus, it was the rule in the Roman law that the *possessio*—that is, the civil possession—was not terminated until the possessor had had notice of the wrongful entry, and had had an opportunity to re-enter. Upon an attempt to re-enter he may be successful, and his possession has then never been interrupted. On the other hand, if he is repulsed by force (D. 41, 2, *de poss.*; 6 Ulp. 1; 25 Pomp. 2), or if he abstains from the attempt through fear (*ibid.*; 3 Paul. 8; 7 Paul.), the civil possession is at an end.

The same principle is recognized in English law. In *Browne v. Dawson* (1840, 12 A. & E. 624), the plaintiff had been master of a school which was under the control of trustees, and had been allowed to occupy the school-house. On June 29, 1833, he was dismissed, and at first he acquiesced in the dismissal. He left the premises, and the trustees peaceably took possession and locked them up. On the next day the plaintiff returned and re-entered by force. On the 4th of July he was required by notice to depart, and, as he persisted in remaining, he was ejected by the order of the trustees on the 11th. It was held that he had not by his re-entry obtained a possession upon which he could maintain trespass. "A mere trespasser," said Lord Denman, C.J., "cannot by the very act of tres-

pass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession." Probably, however, the intruder has a civil possession as against strangers so soon as his actual possession of the land has been established.

Disseisin.

Difficulties of disseisin under the old law.

Disseisin, it has been said, is a complicated fact, and differs from dispossessing. (Per Lord Mansfield, in *Taylor v. Horde*, 1757, 1 Burr. 60; 2 Sm. L. C. 9th ed., 633.) The difference is apparent from the terms which signify, one a privation of seisin (Preston, Abstr. II. 284), the other a privation of possession merely. The special difficulties which have arisen about disseisin seem to be due to two circumstances. Seisin has been supposed to imply a feudal relation between lord and tenant; disseisin the usurpation of this relation; and how the disseisin was to be effected when the relation had become obsolete, and the actual usurpation impossible, was a matter of grave controversy in the last century. Moreover, seisin, as already remarked, touches not only the possession, but the title. Under the old law the owner who was not seised, in addition to losing the beneficial enjoyment of the land, lost also many important incidents of his right of property. His estate was turned by a disseisin into a right of entry, which could not, for instance, be alienated or devised. In favour of the owner, therefore, the law struggled against disseisin, considering the owner to remain seised as long as was possible consistently with the facts. (Preston, Abstr. II. 286.) Hence, there was at once doubt as to what constituted disseisin, and a repugnance to recognize that a

disseisin had taken place. When, however, a disseisin had been established, it was the commencement of a new title (Prest. Abst. II. 284), and the disseisor had an estate in fee which made him owner as against all the world except the disseisee. Under the old law disseisin was a fact of great importance, and the judgment of Lord Mansfield in *Taylor v. Horde* (*supra*), casting doubt upon its nature, was received with much disapprobation by conveyancers, one of whom said that the judgment had “confounded the principles of law, and produced a system of error.” (Preston, Abst. II. 280.) At the present time disseisin has no further effect than dispossession on the title of the owner, but it may still take place (*Leach v. Jay*, 1877, 6 Ch. D. 496; 9 Ch. D. 42), and, just as under the old law, it starts a new title in favour of the disseisor.

In Bracton, disseisin depends upon the duration of the right of entry allowed to the disseisee. This right was his “*primum et principale remedium*” (Bract., ed. by Sir Travers Twiss, Vol. III. 24; f. 162 b.), and such is still the theory of the law. The right of action is subsidiary to the right of entry. (*Magdalen Hospital v. Knotts*, 1878, 8 Ch. D. p. 727.) But at that time the right of entry was described as a right of fresh re-entry merely. If the disseisee was on the land when the disseisin took place, the law gave him four days to collect his forces and reinstate himself. If he was absent, an additional period was allowed varying with the circumstances. (Bract., Vol. III. 26; f. 163.) The entry of the disseisor affected immediately only the natural possession; the seisin or civil possession lasted until the disseisee’s right of re-entry was lost. Thereupon the disseisor was seised (Bract., Vol. III. 32; f. 163 b.), or, at any rate, had a quasi-freehold (Vol. III. 384; f. 209 b.), and the disseisee was

Originally disseisin not complete while disseisee had right of entry.

compelled to have recourse to the assize. If, nevertheless, he entered on the disseisor, an assize would lie against him at the suit of the latter. (Bract., Vol. III. 32; f. 163 b.) And even before the disseisor was seised of the freehold, his possession was protected against strangers. In Bracton, therefore, disseisin seems to be founded upon the analogy of the Roman law as to the loss of *possessio*; not on the usurpation of the feudal relation.

Extension
of right
of entry.

But in course of time the right of entry came to be put on a different footing. It was no longer a right merely of fresh re-entry, to be exercised immediately, but a right ascribed generally to any person out of possession who, as against the actual possessor, was entitled to possession, unless for some special reason it was either denied to him when his right to possession accrued, or, having been allowed to him, was subsequently taken away or "tolled." The right of entry was denied altogether when there had been a discontinuance; it was taken away, after having been at first allowed, by a descent cast.

Discon-
tinuance.

A discontinuance took place when an alienation of the fee by feoffment with livery of seisin was made by a tenant in tail, or by a person seised in right of another—as an abbot in right of his monastery, a husband in right of his wife. (Litt. ss. 592—595.) In these cases the feoffor was enabled to pass a complete right of possession to the feoffee, with the result that the persons entitled after the feoffor's estate had come to an end had no right to enter and take possession, but were put to their action. On the other hand, a feoffment by a tenant for life, although it passed the fee, and was said to divest the estates in remainder, did not work a discontinuance (Co. Litt. 327 b.), and on the death of the tenant for life, or earlier, if the remainderman chose to take advantage of the forfeiture, he might enter on the feoffee. In the case of a

feoffment by a husband seised in right of his wife the law was altered by 32 Hen. 8, c. 28, s. 6, and on the death of the husband the wife might enter (Co. Litt. 326 a.), but the effect of a discontinuance was not finally abolished till 1833. (R. P. L. A., 1833, s. 39.)

The right of entry was tolled by descent when after a disseisin the disseisor, or his alienee, or a subsequent disseisor, died seised of the land, and then, since the land devolved on the heir by act of law, the possession in his hands was no longer looked upon as merely tortious. The disseisee's right of entry was taken away, and he could only recover the possession by action. (Co. Litt. 237 a, b.) In practice the effect of descents was greatly lessened by the fact that the right of entry might be preserved in spite of the descent by the easy formality of making continual claim (Litt. s. 422); and in course of time the statutory requirement was introduced that the disseisor must have had peaceable possession for five years (32 Hen. 8, c. 33), though it appears that the statute only applied to actual disseisors, not to abators, or intruders, or to the feoffees of disseisors. (Co. Litt. 238 a.) The effect of descents in tolling the right of entry was finally abolished by the R. P. L. A., 1833, s. 39, and now every person who is entitled to possession as against the actual possessor has a right of entry upon him, subject only to the restrictions imposed by the Statutes of Forcible Entry. (*Post*, Chap. VII.)

Descent
cast.

After the extension of the right of entry, it still remained true that the disseisor was protected at once against all persons except the disseisee, while, as against the latter, his successor in title was protected so soon as the disseisee's right of entry was gone. "When any man is disseised, the disseisor has only the naked possession, because the disseisee may enter and evict him; but against

Position
of a
disseisor.

all other persons the disseisor has a right, and in this respect only can be said to have the right of possession, for in respect to the disseisee he has no right at all. But, when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseisee cannot enter upon his possession and evict him, but is put to his real action, because the freehold is cast upon the heir." (Gilbert's Tenures, p. 21.)

Effect of
extension
of right of
entry on
disseisin.

The extension of the right of entry was not accompanied by any corresponding prolongation of the seisin in favour of the disseisee, and the disseisin might be complete, although the disseisor's right of entry still existed. But while Bracton's test of disseisin was thus lost, no other test equally definite took its place, and hence Lord Mansfield's doubts in *Taylor v. Horde* (1757, 1 Burr. 60; 2 Sm. L. C. 9th ed. p. 633). The question whether a disseisin had been effected arose especially in cases where it was necessary to discover who was the actual tenant of the freehold, whether for the purpose of making him tenant to the *præcipe*—that is, defendant in a real action—or of ascertaining if a fine levied by the alleged tenant was effectual. It was usually said, too, that the Statute of Limitations only ran from a disseisin. It was a case of the first kind which Lord Mansfield had to consider. "The precise definition," he said (2 Sm. L. C. 9th ed. p. 703), "of what constituted a disseisin which made the disseisor the tenant to the demandant's *præcipe*, although the right owner's entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded."

Disseisin
supposed
to have
originally
depended
on change

In discussing the subject, Lord Mansfield laid stress upon the circumstance that a disseisin implies not merely a change in the possession, but a change in the feudal tenancy. "Seisin," he said (*ibid.*, p. 700), "is a technical term to denote

the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. . . . Disseisin, therefore, must mean some way or other turning the tenant out of his tenure, and usurping his place and feudal relation." And, from the analogy of copyholds and customary freeholds, he argued that the usurping of the freehold tenure must be a different fact from the naked possession or occupation of the land. "At the time I speak of, it might be as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living or mayor of a corporation." (*Ibid.*, p. 702.) Subsequent judges lent their countenance to this recurrence to early history (*William v. Thomas*, 1810, 12 East, 141, see pp. 152, 153; *Doe v. Lynes*, 1824, 3 B. & C. 388, see p. 406), and spoke as though the incidents of feudal tenancy ought still to be a test of seisin. But Lord Mansfield recognized that they were obsolete. After referring to successive changes which had relaxed the strictness of the feudal system, he said: "And at last the total abolition of all military tenures [has] left us little but the names of feoffment, seisin, tenure, and freeholder, without any precise knowledge of the thing originally signified by these sounds; the idea modern times annex to freehold, or freeholder, is taken merely from the duration of the estate." On the other hand, Lord Redesdale seems to have doubted whether these historical speculations had any application. It was apparently with reference to them that he said, in *Cholmondeley v. Clinton* (1821, 4 Bligh. p. 107):—"I can only say that, as far as I have been able to investigate the subject, the law of feuds, strictly speaking, never was the law of this country; and a great deal of the argument which will be found in modern cases, and which is not found in more ancient cases, I think is founded in mistake."

in feudal
tenancy.

Actual
disseisin
and dis-
seisin at
election.

Before going further, it is necessary to distinguish between actual disseisin and disseisin at election. For the purpose of real actions it was frequently unimportant to determine whether a disseisin had actually taken place. Whether or no there had been such a disseisin as to vest the freehold in the disseisor, the disseisee was allowed to treat the disturbance of possession as a disseisin, and in respect of such disseisin at election he had the same remedies as for an actual disseisin. It ranked as a complete disseisin between the parties, although the *quasi*-disseisee might still, as regards the lord and strangers, be tenant of the freehold. (Co. Litt. 239 a, note (1).) "In cases of disseisin at election the rightful owner has in reality the actual seisin, and supposes himself to be disseised solely for the purpose of trying the title in an assize, instead of bringing an action of trespass." (Preston, Abst. II. p. 287.) On the other hand, when the action was brought by a person not himself seised against a tenant whose only title was by disseisin, it was necessary to make sure that an actual disseisin had taken place, and that the apparent tenant was tenant *de facto* of the freehold. So for a fine to be effectual, the person levying it—the conusor—must have had an estate of freehold in the land, and if his title was by disseisin, there must have been an actual disseisin.

Actual
disseisin.

In considering what constitutes an actual disseisin, it is, perhaps, not necessary to pay attention to the original nature of seisin, though even as a matter of history it is probable that the change in the tenancy of the freehold followed upon the change in the possession without any further usurpation of the feudal relation. In other words, the disseisin was effected without reference to the lord, the burden of feudal incidents being determined by the actual state of the possession. (See Professor Maitland's

Article, "The Mystery of Seisin," L. Q. R. Vol. II. 487.) The lord, for instance, lost his wardship and escheat against the disseisee, and gained them against the disseisor. (*Ibid.*; of. Litt. s. 390.) The fact of disseisin seems not to be affected by the circumstance that at a later time the old tenancy was recognized as for some purposes subsisting until the lord had accepted services from the disseisor. (Co. Litt. 268 a.) The disseisee remained tenant in law so that the lord might execute to him an effectual release of his right in the seignory or in the land (Litt. s. 454); and, if he died, his heir being within age, the lord was entitled to wardship. (Co. Litt. 76 b, 266 b, note (1).)

But to turn to authorities more easy to deal with, the statements of Littleton and Coke are express that disseisin is simply an ouster of him who has the freehold. "Disseisin is, properly, where a man enters into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold." (Litt. s. 279.) Commenting on this definition, Lord Coke says: "Every entry is no disseisin, unless there be an ouster also of the freehold. And therefore Littleton doth not set down an entry only but an ouster also, as an entry and claimer, or a taking of profits, &c." (Co. Litt. 181 a.) So in *Blundell v. Baugh* (1634, Sir Wm. Jones, 315), it is said that actual disseisin is a claim by a stranger by entry to have the freehold. These passages give the true key to the matter. The freeholder—the person actually seised—is for the time being owner of the land. The important fact in seisin is not any vestige of a feudal tenancy, but the title which it implies. Actually to oust the freeholder, or, after entering in his absence, to maintain the possession against him (*Reading v. Royston*, 1702, 2 Raym. 829), are acts obviously hostile to his title,

and the disseisin is complete without any express claim by the disseisor. If, however, the possession is vacant, a stranger does not acquire seisin by entering and taking the profits (*Reading v. Royston*), unless it is further shown that he claims in opposition to the freeholder (*William v. Thomas*, 1810, 12 East, 155), such claim being express (Bac. Abr. tit. "Disseisin," (A)), or implied from his entering under a will or other document of title (*Leach v. Jay*, 1878, 9 Ch. D. 42), or as heir, where there has been a devise. (Prest. Abst. II. 292.) These are cases in which it is clear that a disseisin takes place, and in which probably Lord Mansfield would have admitted that a jury might find disseisin as a fact. His doubts were suggested by the case, presently to be mentioned, of disseisin by the feoffment of a termor or other bare possessor.

Repudia-
tion by
tenant.

So far we have regarded the freeholder as being at the time of the disseisin in possession of the land or else seised in law, the actual possession being vacant. If a tenant was in possession, there were four cases in which the seisin of the freeholder might be affected: a claim by the tenant to hold on his own account, ouster of the tenant by a stranger, payment of rent by the tenant to a stranger, and delivery of possession (whether by way of livery of seisin or not) by the tenant to a stranger. The first three cases present no difficulty. The tenant himself could not, either during the term or after its determination, disseise the landlord. During the term he might, by repudiating the landlord's title, forfeit the term; but the landlord was not bound to take advantage of the forfeiture, and his estate was not touched. After the determination of the term, the tenant was still in the same position, for as long as he remained in occupation he was deemed to occupy as tenant, though only as tenant at sufferance. A person who entered lawfully could not, by continuing in posses-

sion, acquire a wrongful title. (*Doe v. Perkins*, 1814, 3 M. & S. 271.) But where the tenancy was in its origin simply a legal form wherewith to clothe the equitable relation of the parties, the rule was relaxed, and a mortgagor might disseise his mortgagee—or at any rate gain a possession adverse to him (*post*, p. 165)—the *cestui que trust* his trustee.

A dispossession of the tenant by a stranger was equivalent to a dispossession of the freeholder himself. Whether at the time of entry by a stranger the freeholder was in possession, or a tenant was holding on his behalf, the stranger was a disseisor. (Prest. Abst. II. 296.) He put an end to the possession on which the existing seisin was based, and he acquired a new seisin for himself. (Litt. s. 411; Co. Litt. 250 b.) But where the stranger did not oust the tenant, but claimed and obtained payment of rent from him, there was no actual interference with the possession of the land, and so no actual disseisin. This was only a disseisin at the election of the freeholder. (Litt. ss. 588, 589.)

Ouster of tenant, or adverse receipt of rent.

The fourth case—delivery of possession by a tenant to a stranger—might arise in various ways. The tenant might deliver the land to one who claimed as owner, or he might himself purport to create an interest in it greater than his own. Ordinarily, since there was no forcible interference with the possession, there was in such cases no actual disseisin, though the freeholder might treat the person thus improperly in possession as a disseisor at his election. Where, for instance, tenant at will leased to one for years, the latter was no more than a disseisor at election. (*Blundell v. Baugh*, 1634, Sir Wm. Jones, 315.) But if the tenant not merely let a stranger into possession, but made a feoffment to him with livery of seisin, it was settled law previously to *Taylor v. Horde* (1757, 1 Burr. 60; 2

Delivery of possession by tenant.

Sm. L. C. 9th ed. 633), that this operated as an actual disseisin of the freeholder.

*Taylor v.
Horde.*

The facts in *Taylor v. Horde* are summarized by Butler in the note to Co. Litt. 330 b, in which he combats the view taken by Lord Mansfield in 1752, and by the King's Bench subsequently in 1777. Here it is enough to say that Dame Ann Atkyns was tenant for life; remainder to Sir Robert Atkyns in tail male; remainders over. Sir Robert Atkyns, being apparently unable to obtain the assistance of the tenant for life to bar the estate tail, in 1710 procured the assignment to himself of certain attendant terms, brought ejectment against Dame Ann, obtained judgment for possession, and entered. Being thus in possession, he made a feoffment with livery to James Earle and his heirs, to the intent that Earle might become tenant of the freehold, and suffer a recovery to the use of Sir Robert and his heirs. The recovery was suffered. In 1711 Sir Robert died intestate, leaving Robert Atkyns his nephew and heir-at-law. Meanwhile Dame Ann in turn had brought ejectment, and in 1712 obtained a verdict; but later in the year she died, and Robert Atkyns entered, and held till his death in 1753. The action of *Taylor v. Horde* was then brought to assert the title of persons entitled in remainder after the estate tail of Sir Robert Atkyns, and two questions were raised: first, whether the recovery was effectual to bar the remainders; and secondly, whether the Statute of Limitations had run. As to the first, the recovery could not be effectual unless James Earle was tenant of the freehold, and this required, either that Sir Robert Atkyns should have been, by his entry under the judgment in ejectment, an actual disseisor; or that his bare possession should have enabled him by livery of seisin to vest the freehold in his feoffee. There was also the objection that the whole pro-

ceeding was covinous, and was designed to enable Sir Robert Atkyns to bar the estate tail without the concurrence of the tenant for life. On this last ground it was held that the recovery was bad, and it was further held, that the Statute of Limitations was a bar. On writ of error to the House of Lords the decision as to the statute was affirmed. The question of actual disseisin, therefore, was not really material, but it was carefully considered by Lord Mansfield in delivering the judgment of the King's Bench.

There was no difficulty, upon recognized principles, in holding that Sir Robert Atkyns was not a disseisor. A judgment in ejectment concerns only the possession, not the seisin; and possession, when thus recovered, is deemed to be held for the actual freeholder. Moreover, Lord Mansfield intimated that the entry could not be made a disseisin even at election. It was not *sine judicio*, and, therefore, on the terms of the writ of novel disseisin, the assize would not lie. This result does not appear to have been controverted. What startled the profession, and produced Butler's refutation, was Lord Mansfield's decision that the feoffment did not vest the freehold in James Earle by disseisin. That originally the actual possessor of land, though not himself seised, could by livery of seisin vest the freehold in a stranger, seems to have been common ground. Anciently, it was said, there were solemnities attending a feoffment with livery which insured notoriety, and put the feoffee in the position of apparent tenant. These solemnities were the presence on the land of the peers of the lord's court for the purpose of subscribing their names to the charter of feoffment, and the recording of the entry of the feoffee in the lord's court. But these solemnities had long been obsolete. The feoffment was good though attested by strangers only, and the recording of the entry

Effect of
feoffment
with
livery by
a possessor
not seised.

was dispensed with. Lord Mansfield, and the judges of the King's Bench upon a subsequent ejectment in 1777, took the view that feoffments, in losing their solemnity, had lost also their efficacy, and that the feoffee did not acquire the seisin. At most he was a disseisor at the election of the freeholder. This would have been a perfectly sound conclusion had feoffments lost their solemnity in recent times, and had the judges been giving them a diminished effect corresponding to such recent change. But Butler took the objection that the ceremonies attending a feoffment with livery must have been changed before the time of Henry II., for the account of them given by Bracton is transcribed by Blackstone as being still applicable at the time he wrote. Yet in spite of the fact that for centuries feoffments had not been attended by the ancient formalities, their efficacy in enabling a termor to pass the freehold had been uniformly recognized until *Taylor v. Horde*. They were even allowed to violate the rule that a termor could not gain seisin against his landlord, for upon the feoffment a momentary seisin vested in the termor, so as to entitle his wife to dower against the feoffee—though this was also put upon the ground of estoppel; and if the feoffment conferred only a limited estate on the feoffee, a tortious reversion remained in the feoffor. Hence Lord Mansfield, when he refused to allow effect to the feoffment by Sir Robert Atkyns, was not changing the efficacy of feoffments in accordance with a then recent change in their nature, but was altering the law in accordance with his own view of what the law ought to be. (Cf. Challis, *Real Prop.*, 2nd ed. 372.) This was beyond his province, and it was not till 1845 that the Legislature intervened, and that feoffments were by 8 & 9 Vict. c. 106, s. 4, deprived of their tortious operation. A tenant for years cannot now by any species of conveyance

disseise his lessor or create any greater interest than he himself has.

As long as the legal estate is outstanding in a trustee or mortgagee, the person who is beneficially entitled to the rents and profits cannot, although he is in possession, be strictly seised; in equity, however, he is regarded as the owner of the land, and he is said, therefore, to have an equitable seisin. Corresponding to the equitable seisin it might be supposed that there can be an equitable disseisin, but this was denied by Grant, M.R., in *Cholmondeley v. Clinton* (1817, 2 Mer. p. 357). At a further stage of the same case (2 Jac. & W. p. 166), Plumer, M.R., differed from him, and so in substance did the House of Lords, but the judgment of the latter tribunal was confined to the case of an equity of redemption. The case is considered at length subsequently. (*Post*, p. 168.)

With the above statement of the law as to the position of a tenant in relation to disseisin, may be compared the rules of the Roman law where the occupation of a tenant supported the *possessio* of the owner. A tenant who refused to give up the land to his landlord was deemed to eject him by force, and to acquire *possessio* for himself. Hence the landlord had a possessory remedy against the tenant, and the tenant, if ejected by a stranger, had a similar remedy against the latter. (D. 43, 16, *de vi*; 12 Marc.; 18 Pap. *pr.*; Sav. Poss. 49.) And the *possessio* of the landlord was lost if a stranger ejected the tenant. (D. 43, 16, *de vi*; 1 Ulp. 22; Sav. Poss. 278.) The case of delivery of possession by the tenant to a stranger was doubtful. Possibly the stranger acquired possession at once, or, in analogy to the rule in cases of actual dis-possession, the *possessio* may have remained in the owner, until he had received notice of the stranger's entry, and had failed to re-establish himself. (Savigny, Poss. p. 280.)

Equitable
disseisin.

Analogies
of the
Roman
law.

It may be noticed that Justinian, possibly with a view to preserving the owner's possessory rights in such cases, enacted that the owner should not be in any way prejudiced by a fraudulent delivery of possession made by a slave, agent, tenant, or other person in actual possession. (C. 7, 32, *de poss.* 12 *pr.*) Allowing for the fundamental distinction between "*possessio*" as implying possession only, and seisin as implying title, there seems an analogy between this provision and the provision of 8 & 9 Vict. c. 106, s. 4.

4. ABANDONMENT OF POSSESSION.

Nature
of the
inquiry.

There remains the case where an existing civil possession of land is terminated, and no new possession is constituted in favour of a third person. As in the previous cases, there are two points for inquiry, the termination of the actual possession, and the effect of such termination on the civil possession. At the commencement of the actual possession there must be present the two elements of physical control and intention to possess. The first point, then, depends on the question, to what extent the physical control and the intention must continue to exist in order to secure the permanence of the actual possession.

Continu-
ance of
physical
element:
power to
reproduce
state of
control.
Animals
feræ
naturæ.

Savigny, who defines the physical control required for the commencement of possession as the immediate power of dealing with the thing, says that, for possession to continue, the possessor must retain the power of reproducing the original state of control. (*Poss.* p. 254.) With regard to wild animals, this supplies a sufficient test, and it is adopted both in the Roman law (D. 41, 2, *de poss.*; 3 Paul. 13), and in our own (*The Case of Swans*, 7 Rep. at 17 b.); though after the animal has escaped, and the fact of possession is at an end, the civil possession, upon which in this case ownership is based, lasts during

fresh pursuit provided recapture is not improbable. (D. 41, 1, *de adq. rer. dom.*; 5 Gaius, *pr.*; Blackst. Bk. II. Ch. 25.) And, with regard to movables generally, the test is in ordinary cases sufficient. As long as a thing is in my house, I can, so far as the thing is concerned, use it at will, and the possession, both in fact and in law, continues; if I have taken it away and lost it, I can no longer use it at will, and the actual possession is at an end. (D. 41, 2, *de poss.*; 3 Paul. 13; 13 Ulp. *pr.*; 25 Pomp. *pr.*) In the Roman law this seems to have terminated the civil possession, but it is not clear that the same rule holds in English law. (Pollock & Wright, Poss. 124; Holmes, Common Law, 237.)

As to
movables.

Another way of stating the test for the continuance of possession is that the thing should remain *sub custodia*—*“res mobiles, excepto homine, quatenus sub eustodia nostra sint, haetenus possideri”* (D. 41, 2, *de poss.*; 3 Paul. 13)—and though from such *eustodia* it follows that immediate physical control can be resumed at will, the term looks rather at an existing state of control. A thing is in my custody when it is so situated that the world at large may know that it is in the exclusive possession of some person, and when I am identified as that person. If we go beyond this state of actual possession, and regard possession as still existing in an animal which has escaped, or in a thing which has been lost, or left in a public place without any indication that it is in any person's possession, we are leaving the sphere of actual possession, and are dealing only with civil possession.

Alternative test:
eustodia.

It would take us too far from our proper subject to examine more closely the nature of the *eustodia* which determines the continued possession of movables, but when we deal with land it becomes apparent that Savigny's test of the power to resume control at will is unsatisfactory.

Continuance of
control
of land.

Land cannot run away, and it cannot be lost or, under ordinary circumstances, destroyed. Provided, therefore, no one else has entered, there is, in the land itself, no reason why the possessor should not at any moment resume the actual use of it. There may be impediments to such resumption apart from the land. The possessor may be made a prisoner, or his means of getting to the land may be interrupted, as by the breaking down of a bridge. But the latter event would hardly be deemed to interrupt the possession, either in fact or in law (Sav. Poss. 255, n. (g); Ihering, *Grund des Besitzes-Schutzes*, 169); and if the former can be regarded as destroying the possession in fact, it has no such effect on the possession in law. (Cf. Holmes, *Common Law*, p. 237.) The examples of forcible detention given in the Roman law suppose detention on the land, and probably it is implied that possession of the land is at the same time acquired by the person using the force. (Savigny, p. 258, and passages there referred to.) But, putting aside these special cases of inability to use the land, and having regard merely to the condition of the land itself, it does not seem to be a sufficient test of actual possession that the person who has once taken possession should be able to resume his occupation at will. A trespasser, who encloses and uses land, would not be deemed to retain actual possession, if he went away, leaving behind him no signs of his occupation; or if he simply erected a fence, his possession would not continue after the fence had been knocked down. (See per Bovill, C.J., in *Worssam v. Vandenbrande*, 1868, 17 W. R. 53.) Similarly, if he occupies a house, and then removes his furniture and leaves the door unlocked. In all these cases he may, provided no one else enters, resume possession at will, but this is not enough to continue his possession. He must keep up some visible signs of his occupation. He must from time

to time be exercising acts of ownership over the land, or he must at least take measures to exclude strangers, as by maintaining fences or locking gates and doors. And this accords with the view above adopted as to the nature of physical control. In the case of land it is not merely the power to use the land and exclude others which satisfies the requirement of physical control, but the actual user and exclusion of others. For the continuance of actual possession this user and exclusion must continue to be manifested. The visible marks of occupation continue the possession as to land, in the same way that *custodia* continues it as to goods; or as to both we may apply Ihering's test, that possession continues so long as the possessor is the apparent owner. (Grund des Besitzes-Schutzes, p. 209.)

In general the intention to possess does not come into prominence in the continuance of possession. As in the acquisition of possession, it is sufficiently apparent from the state of facts relied upon to show physical control. Acts of user, the erection and maintenance of barriers, the leaving of furniture in a house (see per Bramwell, L.J., in *Leigh v. Jack*, 1879, 5 Ex. p. 272), all these show an intention to continue the possession. And if they are at an end, if the occupation is definitely given up, it matters not, so far as actual possession is concerned, that the possessor retains an intention to possess. The physical element being gone, the actual possession is at an end also. This view does not, perhaps, conflict with the rule recognized in the Roman law that possession might sometimes be preserved *animo solo*. The stock illustration was the case of pastures used only at certain seasons of the year. "*Saltus hibernos aestivosque animo possidemus, quamvis certis temporibus eos relinquamus.*" (D. 41, 2, *de poss.*; 3 Paul. 11.) The explanation appears to be that, by using the

Continu-
ance of
animus
possidendi.

pastures at the appropriate season, the possessor did in fact exercise sufficient control over them to support his occupation, and there was throughout, therefore, the proper union of the two elements of physical control and intention.

Termination of civil possession.

In the Roman law the civil possession is said to come to an end so soon as either physical control or intention to possess fails. "*Ejus quidem quod corpore nostro teneremus possessionem amitti vel animo vel etiam corpore.*" (D. 41, 2, *de poss.*; 44 Pap. 2; 8 Paul, as interpreted by Savigny, Poss. 247.) In English law we must distinguish between possession for trespass and seisin, and between possession with and without title.

Possession with title.

Where possession is held with title, the civil possession does not depend upon the continuance of occupation. An owner or a lessee who has once entered can maintain trespass against a stranger, although he is not at the time of the stranger's entry actually occupying the land. Neither is the mere failure of user or occupation a discontinuance of possession within the meaning of the Real Property Limitation Act, 1833, so as to make the statute run. This requires not only absence of possession on the part of the owner, but also actual possession by a stranger. (*Smith v. Lloyd*, 1854, 9 Ex. 562.) It may be said that a withdrawal from possession under such circumstances as to show an intention not to return (see *Leigh v. Jack*, 1879, 5 Ex. D. p. 272)—a failure at once of physical control and intention, or a complete abandonment—would have a greater effect; and would terminate the civil possession although the title still continues. In *Doe v. Bramston* (1835, 3 A. & E. 63), it was held under such circumstances that the statute ran. This seems to be opposed to the later authorities, in which the discontinuance of possession is not made to depend at all upon the intention of the

possessor, but upon the acquisition of a new possession by a stranger; but probably an owner who had thus put himself out of possession, could not maintain trespass until he had re-entered. If this is correct, then civil possession accompanied by title is not terminated by the mere failure of occupation, but is terminated where there is an intention to give up possession.

Where possession has been taken without title, there seems to be no reason to suppose that the civil possession lasts for a moment after the actual possession is abandoned, and this is in accordance with the doctrine of *Trustees' Agency Co. v. Short* (1888, 13 App. Cas. 793), that when a trespasser quits possession, the possession vests again in the owner. "Their lordships," said Lord Macnaghten, "are of opinion that if a person enters on the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place." In other words, the civil possession is not only out of the trespasser, but is vested again in the owner. This result seems to depend on the failure of the physical element in possession, and it is not necessary to refer specially to the intention. The possessor has, in fact, discontinued his occupation, whether he intends to return or not. But in the case of intermittent occupation—the so-called possession *solo animo*—the existence of the intention is material; and, if its continuance can no longer be presumed, the possession is at an end. In *Brown v. Notley* (1848, 3 Ex. 219), the plaintiff had taken a close from the tenant for life for a term which expired at Christmas, 1848. The close was used for cattle, except during the winter months when it was covered with water. In November, 1847, the plaintiff drove his cattle out and

Possession
without
title.

thorned up the gate. The tenant for life died in January, 1848, and the plaintiff obtained a new agreement from a person claiming to be entitled in remainder, but did not enter under it. Shortly afterwards the defendant, who also claimed the land, put a lock on the gate, and the plaintiff brought trespass. It was held that he was not in possession. Apart from the determination of his tenancy, his possession would have continued until he did some act showing an intention to terminate it. But after such determination his continuance in possession would have made him a trespasser, and hence some positive act showing an intention to continue it was necessary, such as keeping cattle on the close, or, if the gate had been locked, retaining the key. (Per Parke, B., *ibid.* 222.) In other words, the possession not being supported by continuous user, it was at an end, when, owing to failure of title, the intention was deemed to have been changed.

Continu-
ance of
seisin.

The remarks which have been made as to continuance of possession held under title apply also to the continuance of seisin when the freeholder is the person lawfully entitled. When the true owner has by entry acquired seisin in deed, this lasts until terminated by the transfer or devolution of his title, or by a disseisin. With respect to the seisin of a disseisor, whose title is not yet perfected by the Statute of Limitations, it is difficult to speak with certainty. Upon principle his title is perfectly good save as against the disseisee, and even against the disseisee he ranks as freeholder until the true title is restored by re-entry. Hence the case is analogous to that of possession under title, and the seisin of the disseisor might be supposed to continue exactly as though he was the true owner until re-entry by the disseisee. But for the decision of the Privy Council in *Trustees' Agency Co. v. Short* (1888, 13 App. Cas. 793), it would have been submitted

that this is the law. In that case, A., the true owner, had a title to land in New South Wales under a Crown grant of 1810. More than twenty years before the commencement of the action, possession was taken by B., and the statute thereupon ran against A. Before the statutory period had elapsed, B. abandoned the possession, and subsequently C. took possession and was in possession at the end of the twenty years. He claimed that the statute had continued to run against A., and that A.'s title, therefore, was barred. But, as already stated, the Privy Council held, that when B. abandoned possession, A. was placed in the same position as before the intrusion took place. It was not found as a fact that B. was a disseisor. If he was a mere trespasser, the decision is less open to objection; though even then it seems doubtful whether, after a dispossession, the possession can vest again in the owner without re-entry. But having regard to the circumstances of the case, and in particular to the direction of Martin, C.J., which assumed that the intruder claimed the land, it seems probable that he was a disseisor. If so, the fee was in him, and A. had merely a right of entry, and this state of things must have continued until B.'s actual estate in fee had been terminated in one of the recognized modes—transfer, devolution on death, or fresh disseisin—or until A.'s re-entry. Mr. Challis suggests that the restoration of A. to his original seisin can only be explained by a novel application of the doctrine of remitter. (L. Q. R. Vol. V. 185.) In fact, however, the case was decided without regard to any technical rules as to seisin, and it appears to be founded rather on the distinction between ownership and possession of the Roman law than upon the common law distinction between an estate and a right of entry.

CHAPTER IV.

THE MAINTENANCE OF POSSESSION.

The protection of possession. POSSESSION, whether accompanied by title or not, enjoys a certain measure of protection which varies in different systems of law. This protection may be considered according as it is designed to maintain or recover possession.

Trespass. The appropriate remedy in English law for maintaining an existing possession is an action of trespass, but this is not restricted merely to the maintenance of possession. Any disturbance of an existing possession is regarded as a trespass, for which, in the absence of justification, an action will lie. The disturbance may be so serious as quite to put an end to the possession, and hence trespass lies against a disseisor (Litt. s. 430); or, on the other hand, it may be so slight as to be only important as an infringement of the possessor's apparent right. (*Ellis v. Loftus Iron Co.*, 1874, L. R. 10 C. P. 10.) But statements that the maxim "*de minimis lex non curat*" has no application to the law of trespass (Clerk & Lindsell on Torts, p. 267), and that the smallest possible interference with the rights of another is actionable, go perhaps too far, and it may be doubted whether every unlawful entry on land, however harmless or unpremeditated, is actionable. (L. Q. R. Vol. VIII. 143, n.; and see Article in 97 L. T. p. 192.)

Actual possession required.

As already pointed out, the possession protected in trespass is wider than the *possessio* of the Roman law, and includes every possession in fact except that of a servant.

On the other hand, it is restricted to possession in fact, and to maintain trespass the plaintiff must have had an actual possession at the time of the alleged trespass as opposed to a mere right to possess. "It is common learning," said Martin, B., in *Hodson v. Walker* (1872, L. R. 7 Ex. at p. 69), "that to maintain trespass to real property the plaintiff must have been in possession at the time the trespass was committed. The gist of the action is the injury to the possession, and the plaintiff's having the title will not enable him to maintain trespass." (Cf. *Harper v. Charlesworth*, 1825, 4 B. & C., per Holroyd, J., at p. 592.) And accordingly a lessee (*Wheeler v. Montefiore*, 1841, 2 Q. B. at p. 142; *Ryan v. Clark*, 1849, 14 Q. B. at p. 73), or the assignee of a lease (*Harrison v. Blackburn*, 1864, 17 C. B. N. S. at p. 691), cannot maintain trespass in respect of the premises until he has actually entered upon them. So, although a statutory possession under the Statute of Uses is sometimes called an actual possession, it is merely a possession in law, and will not suffice for trespass. "If," said Bridgman, C.J., in *Geary v. Bearcroft* (1667, Carter, 57), "a man bargains and sells lands, presently the bargainee hath actual possession; he may surrender, assign, attorn, and release; yet he cannot on this possession bring a trespass." (Cf. *Litchfield v. Ready*, 1850, 5 Ex., per Parke, B., at p. 945.)

There appear, however, to be two exceptions to this rule. One is in favour of a landlord who has let his land at will. Since he is entitled to resume possession at any moment, he is allowed to sue in trespass as though he was in actual possession. (Pollock on Torts, 3rd ed. p. 325; Bigelow's L. C. on Torts, p. 355.) And the other depends on the doctrine of trespass by relation. This doctrine is founded upon the notion that when a person who is in possession is dispossessed, and subsequently recovers possession, he

Exceptions:

1. Lessor at will.

2. Trespass by relation.

ought, for the purpose of bringing trespass, to be regarded as having remained in possession the whole time. Formerly it appears to have been applied only in cases of disseisin. A disseisee, after re-entry, was able to bring an action of trespass against the disseisor in respect of the continuance of the latter upon the land, and thus recover mesne profits. So, too, he could bring trespass against a stranger for a trespass, not amounting to a fresh disseisin, done during the disseisin, for by re-entry he vested the possession in himself *ab initio*. (Com. Dig. "Trespass," B. 2.) But in this respect the law was not consistently carried out, and the disseisee was unable to maintain trespass, and recover mesne profits, against persons claiming by title under the disseisor, or even against a subsequent disseisor. (*Liford's Case*, 11 Rep. 51 a.) In such cases he recovered the whole profits against the original disseisor. (Cf. Bigelow's *L. C. on Torts*, p. 361.)

Modern
extension
of trespass
by rela-
tion.

Recently, however, the doctrine of trespass by relation has been extended to the case of trespass upon a possession left vacant by the death of the possessor. If he was seised, this is the case of heir and abator, and it was at one time said that the heir's seisin in law was not sufficient to give him the benefit of trespass by relation upon his subsequent entry. (Com. Dig. "Trespass," B. 3.) But this is a hardship on the heir, who is left without remedy, and *Barnett v. Earl of Guildford* (1855, 11 Ex. 19) appears to establish that the doctrine applies both in favour of the heir as to freehold property, and in favour of the executor or administrator as to leaseholds. But this is only on account of the vacancy occasioned by the decease of the ancestor, or testator or intestate, and the doctrine does not apply where by assignment a right to possession is vested in an assignee. *Litchfield v. Ready*, 1850, 5 Ex. 939; cf. *Radcliffe v. Anderson*, 1858, E. B. & E. 819.)

It is a settled principle that possession, apart from title, enables the possessor to maintain trespass. Hence, it is not competent for the defendant to justify his trespass by merely showing that the plaintiff's title is defective. He may, however, justify by setting up title in himself—a title, that is, giving an immediate right to possession (*Ryan v. Clark*, 1849, 14 Q. B. 65)—or in some person under whose authority he is acting. At one time the distinction seems not to have been recognized, and it was thought that the defendant could set up the *jus tertii*. Thus, if he justified his entry as being made by command of, or as bailiff to, the person entitled to possession, the actual possessor was not allowed to traverse the command, or the authority, and the sole question was as to the outstanding title. "It is not material," it was said in *Trevilian v. Pyne* (circ. 1700, 1 Salk. 107), "that the defendant has done a wrong to a stranger, if it be none to the plaintiff." But this doctrine would rob trespass of its character as a possessory action, and it has not been followed. In *Graham v. Peat* (1801, 1 East, 244), it was allowed that a possessor could maintain trespass against a wrongdoer, although the title of the possessor was shown to be bad, and *Trevilian v. Pyne* was expressly overruled by *Chambers v. Donaldson* (1809, 11 East, 65), where it was held that in trespass *quare clausum fregit*, if the defendant pleaded title in another by whose command he justified, the command might be traversed.

Justification.

But though it is said generally that the defendant in trespass may justify by setting up title in himself, this implies that his title gives him a right to immediate possession. Such right carries with it a right of entry, and it is really under the latter right that he justifies. If he has no right of entry he is a wrongdoer, and the person in actual possession can maintain trespass against him.

Title must involve right of entry.

(Cf. *Harper v. Charlesworth*, 1825, 4 B. & C. p. 592, per Holroyd, J.) This distinction was not observed in the old rules of pleading, and the inaccuracy caused considerable misgiving. (*Lambert v. Stroother*, 1740, Willes, 222.) Thus, where the defendant pleaded *liberum tenementum*, he might well have a freehold estate, and yet have no right to enter. The plaintiff, for instance, might be his tenant. The plea was accepted, however, in practice as alleging a freehold in the defendant with a right to immediate possession (*Doe v. Wright*, 1839, 10 A. & E. p. 781; *Ryan v. Clarke*, 1849, 14 Q. B. p. 71); and it was for the plaintiff to reply, if he could, that such right did not in fact exist. It must be noticed that the right to immediate possession, carrying with it a right of entry, does not imply a right which is good against all the world; it is sufficient that it exists against the plaintiff. This will be the case if the plaintiff in obtaining possession has made himself a wrongdoer as against the defendant's earlier possession, although the absolute title be outstanding in a third person. The point depends on the nature of a right of entry, a matter which can more conveniently be considered in connection with the remedies for recovering possession. (*Post*, p. 96.)

Roman
law.

In the Roman law there does not seem to be any procedure quite on the same footing as the action of trespass, but analogies are afforded by the interdicts *quod vi aut clam* (D. 43, 24), and *uti possidetis* (D. 43, 17). The former lay for any forcible or secret interference with the soil, or with things affixed to the soil (D. 43, 24, *quod vi aut clam*; 1 Ulp. 4), as ploughing or digging a ditch (*ibid.*; 9 Ulp. 3; 22 Ven. 1), cutting down trees (7 Ulp. 5), or destroying buildings (7 Ulp. 9; 9 Ulp. *pr.*). And an interference with the soil was said to be forcible if done after prohibition. (*Ibid.*; 1 Ulp. 5.) The remedy was

aimed primarily at the violence or secrecy (1 Ulp. 3), and it accrued to the person who was thereby damaged (11 Ulp. 14; 12 Ven.); to the owner, if the damage touched the reversion; to the usufructuary or tenant also, if it touched the present enjoyment of the land. (16 Paul. 1.) It did not require that the plaintiff should have been in possession at the time of the injury, and if he was in possession he need not have had *possessio* in the technical sense. (16 Paul. *pr.*) The interdict accordingly is not treated as one of the possessory interdicts.

The recognized possessory remedy for the maintenance of possession was the interdict *uti possidetis*. (D. 43, 17, *uti poss.*; 1 Ulp. 4, 8.) This was intended to guard against the disturbance, real or apprehended, of an existing possession; though, if real, it must have stopped short of putting an end to the possession. Originally, as appears from the form of injunction issued by the prætor—" *ut eas aedes, quibus de agitur . . . quo minus ita possideatis, vim fieri veto* (ibid.; 1 Ulp. *pr.*)—it implied violence, but violence was assumed to exist whenever a possessor was prevented from using the land as he pleased (D. 43, 16, *de vi*; 11 *Pomp.*); and there are indications that any interference with the quiet enjoyment of the land was a ground for granting the interdict. (D. 43, 17, *uti poss.*; 3 Ulp. 2—6; cf. Windscheid, Pand. I. p. 430—"Possession is disturbed, without being terminated, when in any single respect the will of a non-possessor is made to prevail with regard to the thing over the will of the possessor.") If this was the case, then, since damages were given for past disturbance (Savigny, Poss. 313; D. 43, 17, *uti poss.*; 3 Ulp. 11), the effect would be very much the same as in trespass. But on the other hand it is said that the disturbance must be of a permanent character (Sohm's Inst. trans. by Ledlie, 253)—must really threaten the

Interdict
uti possi-
detis.

possession—and this accords better with the original object of the interdict, which was probably to maintain the existing possession until the determination of the question of title. To entitle the plaintiff to the interdict, he must have *possessio*, that is, he must have civil possession as opposed to mere natural possession (D. 43, 17 *uti poss.*; 1 Ulp. 6; 3 Ulp. 8), an exception, however, being made in favour of the usufructuary. (*Ibid.*; 4 Ulp.) But where “*possessio*” existed, it was immaterial that its origin was wrongful. “*Qualiscumque enim possessor hoc ipso, quod possessor est, plus juris habet quam ille qui non possidet.*” (*Ibid.*; 2 Paul.)

Defence. The remedy being solely possessory, the defendant could not justify the disturbance by setting up title. He might, however, plead one of the *exceptiones vitiosæ possessionis*; that is, that the plaintiff had obtained possession from him wrongfully (*vi, clam*), or that he held under him as tenant at will (*precario*). (*Ibid.*; 1 Ulp. *pr.*, 5.) In favour of the defendant, who as against the plaintiff is entitled to possession, and who can recover it by a possessory remedy, the slight violence involved in the trespass is overlooked. In other words, out of the wrong to the defendant's previous possession, there arises a right of entry which justifies a trespass on the possession of the plaintiff. If, however, the trespass is by a stranger, then, as just stated, the plaintiff is not prejudiced by the tortious nature of his possession, and the interdict is available for him. (*Ibid.*; 1 Ulp. 9.) Thus if A., who has *possessio*, whether with title or without, is ejected by B., A. has a right of entry under which he can justify a disturbance of B.'s possession. But as against a third party C., B.'s possession is protected, notwithstanding its wrongful origin.

CHAPTER V.

THE RECOVERY OF POSSESSION.

So long as there is a distinction between proprietary and possessory actions, a claimant may recover possession of land either upon his right of property in a proprietary action, or upon his right of possession in a possessory action. In the former case, the title to possession is finally settled as between the parties to the action; in the latter case it is settled only provisionally, and the party defeated in the possessory action may still be able to gain possession by a proprietary action. In the Roman law and in the former English law, the distinction between the two forms of procedure was well established. In the present English law it has disappeared, and in an action to recover possession of land, the plaintiff and defendant alike may set up any title they have.

(a) PROPRIETARY ACTIONS.

A proprietary action, as just stated, is an action in which the plaintiff relies on his right of property. Ordinarily, perhaps, the term implies that he claims as owner, though the action is in principle the same when the plaintiff claims possession in respect of some subordinate right derived under the owner. But ownership, or *dominium*, in the Roman law, is essentially different from the estate in fee simple which takes its place in English law, and the distinction involves a corresponding

difference in proprietary actions. In Roman law there can be only one owner, and he remains owner whether or no he has possession. He may lose his ownership by remaining out of possession, but till that event has happened his legal position is unchanged. He is owner, and the person who has obtained possession is no more than possessor. The ownership which the law recognizes implies a title good as against all the world, and when a claimant desires to recover possession by a *rei vindicatio*, the ordinary proprietary action, it is a title of this kind that he must prove. The mere possessor cannot bring the action, though, when his possession is such that time is running in its favour, when, that is, it has originated in lawful title, and is *bonâ fide*, a special remedy, the *actio Publiciana* (D. 6, 2, *de Publ. act.*; 1 Ulp. *pr.*), was introduced by the prætor for his benefit. Apart from this it would seem that a previous possession by the plaintiff in a proprietary action was only effectual as presumptive evidence of ownership. (Cf. Paul. Sent. V. 11, 2; Ihering, *Grund des Besitzes-Schutzes*, 52.) He would fail, therefore, if the defendant could in any way show that he was not in fact the owner. The action of ejectment appears to have been sometimes treated as though it required the same strict proof of title. (Cf. *Doe v. Barnard*, 1849, 13 Q. B. 945.)

In former
English
law.

In English law proprietary rights are more intimately associated with possession, that is, with the form of possession known as seisin. The person who is seised of land is owner *de facto* in a sense in which this phrase could not be used of the "*possessor*" of Roman law. He has an estate which can be alienated or devised, and which has all the incidents of ownership as regards strangers. If it was gained by disseisin, the disseisee has no estate, but merely a right of entry. This right is, at the present time, capable of being devised or alienated, and it is not liable to

be tolled save by lapse of time; but the person entitled to it, although he is properly spoken of as owner, is merely owner *de jure*. There are now, indeed, two titles. "As soon as a disseisin is committed, the title consists of two divisions; first, the title under the estate or seisin; and secondly, the title under the former ownership" (Prest. Abst. II. 285); and in dealings with the land, each of them has to be taken into account.

The principle that seisin confers a title as against strangers seems to have been recognized in the writ of right, the proprietary action of the early English law. In form, indeed, that went as near alleging absolute ownership as was possible under the circumstances. An allegation merely of the seisin in fee of the claimant or his ancestors, which was sufficient in a possessory action, was not sufficient in a writ of right. It must also be stated that the seisin had been made effectual by the taking of "esplees" or profits. This implied that union of *jus proprietatis* and *jus possessionis*, which went by the name of *droit droit*. (Bracton, III. 360; f. 206 b; Co. Litt. 266 a.) Moreover, the seisin was alleged to be *de jure* (Bracton, V. 432; f. 372 b); and it was settled so late as the present century that this allegation was essential. (*Dowland v. Slade*, 1804, 5 East, 272.)

But the allegation of seisin *de jure* is not to be taken to bar a person entitled under a tortious seisin from recovering in a writ of right. Such a person must establish the seisin under which he claims, and must show that it existed in the time of the king named in the pleadings (Litt. s. 514); moreover, if it was the seisin of an ancestor, he must deduce title under the ancestor. All this is the foundation of his title. But when it has to be determined whether the title thus set up shall prevail against the tenant, the question is not whether it is an absolute title

Writ of
right.

Title need
not be
perfect.

good against the world, but whether it is relatively better than any title which the tenant can show. (Cf. Ihering, *Grund des Besitzes-Schutzes*, 73 n.) Sometimes, indeed, the writ of right is spoken of as though it required absolute title. It is said that it is a writ brought by him who has the full and mere right of property to the land in him, to recover the right of possession. (Booth, *Real Actions*, p. 85.) But, in fact, the "mise" was joined (Co. Litt. 294 b), or issue taken, on the question which of the two parties, the demandant or the tenant, had the greater right. (*Majus jus*; Glanville, trans. by Beames, p. 58; Bracton, Vol. V. 108; f. 331 b; Booth, *Real Actions*, 96.) In other words, though the question related to "mere right," yet this was only as opposed to right of possession, and the matter to be determined was whether the demandant or the tenant had the "more mere right" (Litt. ss. 482, 485, 488); in short, whether, putting aside the *jus possessionis*, a phrase which will be considered subsequently, the demandant had right to the land as against the tenant. (Cf. Litt. s. 487.) It may be noticed that Bracton expressly recognizes that there may be different rights of property, a better right and a worse right, existing together (Vol. VI. 433; f. 435); and that although a person has "most possession and most right," another may still have "*majus jus*." (Vol. III. 4; f. 160.)

Writ of
right on
a tortious
seisin.

But the matter does not rest there. A case is given by Littleton (s. 478), where a writ of right might be brought on a tortious seisin, and there is no hint that exception could be taken to the defect in the demandant's title, nor is any such suggestion made by Lord Coke. "If a man be disseised by an infant who alien in fee, and the alienee dieth seised, and his heir entereth, the disseisor being within age, now is it in the election of the disseisor to have a writ of *dum fuit infra ætatem*, or a writ of right against the

heir of the alienee, and which writ of them he shall choose, he ought to recover by the law." The result seems clear, that as in general the person actually seised ranked as owner for the time being, so, after seisin had been lost, he might recover in a proprietary action as against all persons claiming under a subsequent seisin. As between the successive seisins, the only test is priority in point of time. "The first and more ancient is the most sure and more worthy title; *Quod prius est, revius est, et quod prius est tempore, potius est jure.*" (Co. Litt. 347 b.) And the "most ancient" is at the same time the "most mere" right. (Litt. s. 478.) The title which a demandant must establish in a writ of right is not an absolute title against all the world, but a title relatively better than that of the tenant. (Cf. per Lord Ellenborough, C.J., in *Dowland v. Slade*, 1804, 5 East, p. 289.)

(b) POSSESSORY ACTIONS.

The result of affording legal protection to possession—*Jus possessionis* in the Roman law, seisin in the English law—is to create a right of possession. The term *jus possessionis* is used occasionally in Roman law (D. 41, 2, *de poss.*; 44 Pap. *pr.*; 48, 6, *ad L. Jul. de vi pub.*; 5 Marc. 1; cf. Sav. Poss. 17), and it is familiar in English law. But so soon as a right of possession is recognized, it is capable of existing apart from the possession on which it was founded. It may, therefore, descend to an heir, and after the possession has been parted with—as to a tenant—it may enable the former possessor to recover possession. The distinction between possessory remedies in the Roman and in the early English law depends on the extent to which this quality is ascribed to the right of possession.

In the Roman law possession is treated as altogether distinct from property. "*Nihil commune habet proprietas* Property and possession."

cum possessione.” (D. 41, 2, *de poss.*; 12 Ulp. 1.) Possession is protected by the interdicts, but these are in general personal to the possessor, and the resulting right of possession is not dealt with as an independent right. It exists solely by virtue of the specific remedies, and does not rank as a species of ownership. In English law the position of seisin is different. It cannot be said that seisin—even tortious seisin—has nothing in common with ownership. The *jus possessionis* founded on seisin is identical with an estate in fee simple—or with some smaller interest carved out of such an estate—whether defeasible, as an estate acquired by disseisin (Co. Litt. 58 b.), or not; and it confers all the advantages of a *jus proprietatis* as against strangers. The *jus possessionis* is the ownership *de facto*, and exists as an independent right until the owner *de jure* restores his estate by entry or action. The range of possessory remedies is correspondingly extensive, and in fact the distinction between proprietary and possessory actions was chiefly in respect of procedure. Possessory actions existed for all the ordinary wrongs which an owner could suffer, and it was usually sufficient for him to rely upon his right of possession. The right of possession was more easily asserted than the right of property, and an owner who had the right of possession was entitled to take advantage of this fact. Conversely, as against strangers, the right of possession carried with it the right of property, and the disseisor had his choice of bringing a possessory action or a writ of right. The two rights are only contrasted when the owner has lost his right of possession, and is driven to rely solely on his right of property.

Changes
in rights
of possession
and of
property.

The changes in the two rights are frequently described in the books. If A., the true owner of land, is in possession, he has *jus proprietatis* and *jus possessionis*. If he is

disseised by B., B. has at first no right at all against A., though as against the rest of the world he has at once a *jus possessionis*. But when A.'s right of entry is tolled, B. has now a complete *jus possessionis* against A., and if A. enters, B. will recover against him in a possessory action. A. retains, however, for a time his right to bring a possessory action against B. (Co. Litt. 283 b.), and when this is barred, he has, for a further time, his writ of right. (Co. Litt. 266 a.; 239 a., note (1); Black., Bk. III. Ch. 10; Gilbert's Tenures, p. 23.) And all this time, since B. can bring a writ of right on his tortious seisin against strangers, it seems correct to say that, as against them, he has a *jus proprietatis*.

In form, the distinction between proprietary and possessory actions, whether in the Roman or the early English law, is well marked. In a possessory action neither plaintiff nor defendant can allege title as owner. The plaintiff alleges merely possession—that is, *possessio* or seisin—in himself or in some person through whom he claims, and a specific wrong to such possession. The defendant, on the other hand, may set up a previous possession in himself or in some person through whom he claims, and may plead by way of justification a wrong to that possession. This is equivalent to saying that he sets up a right of entry. In the Roman law the defence is limited to the three *exceptiones vitiosæ possessionis* (*vi, clam, precario*), and no direct reference is made to a right of entry. In the English law the defences are as numerous as the possible infringements of the *jus possessionis*, and the right of entry is recognized as an independent right existing in favour both of the person originally wronged and his successors in title until for some special reason taken away or “tolled.” But the substance of the defence is in each system the same—a previous wrong to possession for

Defence to
possessory
action.

which the defendant might have had a possessory action. In neither can the defendant set up his right of property.

Infringe-
ments of
the right
of posses-
sion.

For simplicity it has been said that in a possessory action the plaintiff alleges a wrong to his possession. This is sufficient for the case where he has himself been dispossessed, but it is more correct to say that he sets up a violation of his right of possession, and the possession on which this is founded may be a possession which he himself has never had, or which he has parted with. Treating the matter on this footing, the right of possession may be violated in three ways: by a wrongful entry on an existing possession, by a wrongful entry on the death of the possessor before the entry of the heir, or by a wrongful holding over after the termination of a limited interest granted by the possessor. In English law these are the three cases of disseisin, abatement, and deforcement. The Roman law recognizes wrongs corresponding to the first case and the third case, but probably not to the second. Moreover, since in English law the *jus possessionis* springs out of an estate in fee which is capable of settlement, we have also the case of intrusion. In considering the various forms of possessory actions it is convenient to classify them according to the wrongs they were intended to remedy.

I.—*Possessory Remedies in the Roman Law.*

It would be out of place here to attempt any detailed examination of the possessory remedies of the Roman law, but it is believed that a short statement of their general scope and effect will be of assistance, rather, perhaps, by way of contrast than of analogy, in understanding the relation between proprietary and possessory actions in the former English law, and also in understanding the present system under which the distinction between the two classes of action has ceased to exist.

(1.) *Dispossession.*

In the Roman law a possession lost by force could be recovered by the interdict *unde vi.* (D. 43, 16, *de vi*; 1 Ulp. 1.) There was equally a forcible dispossession whether the possessor was actually ejected from the land, or, possession having been taken in his absence, he was prevented from re-entering. (*Ibid.*; 1 Ulp. 24; 3 Ulp. 8.) So, too, if a stranger entered secretly (*clam*), and refused to leave, this was a forcible dispossession (D. 41, 2, *de poss.*; 6 Ulp. 1); and a special interdict *de clandestina possessione*—if it ever existed, which is doubtful (Sav. Poss. 348; cf. D. 10, 3, *comm. div.*; 7 Ulp. 5)—became unnecessary. It was essential, however, that the taking possession should be against the will of the possessor, and hence the interdict did not lie in the case of a delivery of possession under the influence of fear. (D. 43, 16, *de vi*; 5 Ulp.) To maintain the interdict the plaintiff must have had *possessio*. “*Interdictum autem hoc nulli competit nisi ei qui tunc cum deijceretur possidebat*”—in the technical sense, that is, not merely *in possessione*—“*nec alius deijci visus est quam qui possidet.*” (*Ibid.*; 1 Ulp. 23.) As a matter of convenience, however, the interdict was granted, like the *uti possidetis*, to the usufructuary (*ibid.*; 3 Ulp. 13, 14); and, where the person ejected was not the possessor, it lay in favour of the person on whose behalf he was occupying. (D. 43, 16, *de vi*; 1 Ulp. 22; 20 Labeo, Paulus.) And title was immaterial. It was sufficient that the plaintiff had been possessor, even though he was not the owner. (“*Vel non dominus*, D. 43, 16, *de vi*; 8 Paul.)

Interdict
unde vi.

Defence.

Originally the defendant could use the same plea as in trespass, and could allege that the plaintiff himself had committed a wrong to the defendant's previous possession. (*Vi, clam, precario*; Gaius, IV. 154.) In other words, such

earlier wrong gave him a right of entry. But this right was subject to an important restriction as to the manner in which it might be exercised, and although the use of unarmed force (*vis quotidiana*) was permitted, it was forbidden to have recourse to arms (*vis armata*). Hence, if the defendant had entered in this manner, the entry was wrongful, his plea failed, and he would be compelled to restore the possession. (*Ibid.* 155.) But subsequently this distinction was abolished. By a constitution of A.D. 389 (C. 8, 4, *unde vi*, 7) violence of all kinds was punished by loss of possession, and the result seems to have been to deprive the defendant in the interdict of the advantage of pleading the previous wrong to his own possession. (Cf. Ortolan's Justinian, II., p. 763.) Hence, when the interdict is described by Justinian, it is expressly said that no such plea is available. (Inst. IV. 15, 6.) In addition to this, violence was punished criminally under the *Lex Julia de vi*, and the offender, if he had used *vis publica*, might be condemned to banishment; if *vis privata* (*sine armis*), to forfeiture of the third part of his goods. (Inst. IV. 18, 8.) The result of these laws was at once to make a violent entry a crime, and to take away the right of entry which was previously recognized in the interdict procedure. The Roman law thus differs from the English law which, while making a forcible entry a crime, leaves the civil right untouched. (*Post*, Chap. VII.)

Right of
entry.

Originally, then, an ejected possessor had a right of entry to be exercised with slight force only. Thus if A., a possessor, was ejected by B., B. did not at once gain a possession protected against A., although it was protected against all other persons: "*Qui a me vi possidebat, si ab alio dejiciatur habet interdictum.*" (D. 43, 16, *de vi*; 1 Ulp. 30; Ulpian wrote before the Constitution of A.D. 389, above referred to.) Subsequently, however, A. was not

allowed a right of entry, and the possession of B. was protected at once against all the world. He obtained, that is, by his wrong, a complete *jus possessionis*. This assumes that A.'s earlier possession had been really ended, for it was permissible to use even armed force to defend an existing possession from attack, or to recover it immediately. (*Non ex intervallo, ibid.* ; 3 Ulp. 9.) In other words, the law recognized a right of fresh re-entry.

Ordinarily, in Roman law, the parties to a possessory action are the persons actually concerned in the wrong complained of, the possessor who has been ejected and the wrongdoer. But, as to the possessor, there seems to be no reason why, in the event of his death, restitution should not be made in a summary way to his heir, and the heir accordingly was allowed to bring the interdict. (D. 43, 16, *de vi* ; 1 Ulp. 44.) As to the defendant, it is to be remembered that the interdict was not only for the restoration of possession, but also for damages, it being the right of the plaintiff to be put entirely in his original position (*ibid.* ; 1 Ulp. 31), and this seems to have been a ground for restricting it to persons implicated in the wrong complained of. Thus it lay against the ejector himself, whether the wrong was done by him personally, or by other persons acting under his orders (D. 43, 16, *de vi* ; 1 Ulp. 11, 12) ; and also against any person who wrongfully (*dolo malo*) procured the ejectment to be made. (*Ibid.* ; 3 Ulp. 12.) But it did not lie against the heir or other person claiming under the ejector or against a stranger. (D. 43, 17, *uti poss.* ; 3 Ulp. 10 ; 43, 16, *de vi* ; 7 Paul.) To a certain extent this defect was cured by the rule that the interdict lay against the wrongdoer, although he had parted with the possession, and he was compelled to pay the value of the plaintiff's interest (D. 43, 16, *de vi* ; 1 Ulp. 36 ; 15 Paul.) ; and it made no

Parties
to the
interdict.

difference that he had lost possession without any fraud or negligence on his part. But there was still the possibility that he might die in possession, and that his heir would profit by his ancestor's wrong. Hence, although the heir was not liable to the interdict, and could not be called upon to pay damages, a different remedy, an *actio in factum*, lay to recover the possession. And as this was merely to recover the possession, and was not in any sense penal, it was not limited, like the interdict, to the year. (D. 43, 16, *de vi*; 1 Ulp. 48; 2 Paul.; 3 Ulp. pr., 1.) And a similar action was allowed against the wrongdoer himself, after the interdict was barred by the lapse of the year. This remedy appears to be based on the principle that possession gives a title. The judgment does not punish the wrong, but simply restores the possession to the party who, as against the other, has the better right.

(2.) *Wrongful Entry on Death of the Possessor.*

Entry on
death of
possessor.

It appears to be very doubtful whether the Roman law had any remedy for the case where a stranger entered upon the death of the possessor; a remedy, that is, in which the heir recovered as against a stranger solely on proof of the possession of the deceased and his own title as heir. The point is a crucial one for the rival theories of Savigny and Ihering. If, as Savigny held, possessory remedies are designed to check violence, it is sufficient to give them to the actual possessor. The heir who has not entered need not be considered. Hence, in spite of the division of interdicts into interdicts for maintaining, recovering, and obtaining possession (Inst. IV. 15, 2), and the mention of the interdict *quorum bonorum* as an interdict for obtaining possession, Savigny rejects such a remedy as contradictory. According to him, possessory remedies must be founded on the existing or previous

possession of the plaintiff. He cannot by such a form of procedure originally obtain possession. Savigny suggests two grounds on which the interdict *quorum bonorum*, by which an heir under certain circumstances obtained possession of the goods of his testator, might rank as possessory; by fictitiously ascribing possession to the heir when he has in fact no more than a right to possess; or by allowing him to base his remedy on the possession of his testator. (Poss. 290.) The fiction is the seisin in law of English law, but there is, Savigny says, no authority for it in Roman law; and although the interdict in question has been referred to the latter ground, he denies that it was in fact founded on possession. A different view is taken by Ihering. According to him possessory remedies exist in favour of the owner to save him from the burden of proof of title, and since this burden is equally heavy for an heir who has never been in possession, his theory requires that the heir should have an appropriate possessory remedy. Such a remedy he suggests was afforded by the *hereditatis petitio* for the heir at law, and by the *bonorum possessio* for the heir in equity. (Grund des Besitzes-Schutzes, 85 *et seq.*) But the details of the controversy do not concern us. The important point is, that the Roman law did not distinctly recognize that the right founded on possession went, like a right of property, to the heir.

(3.) *Wrongful Continuance in Possession.*

In general, when a possessor parted with the actual possession of the land to a tenant, he retained the *possessio* in himself. Hence, if the tenant, either during the term or afterwards, disclaimed the landlord's title, this disclaimer was regarded as a forcible dispossession of the latter. The tenant at once acquired the *possessio*, and the landlord might bring against him the interdict *unde vi*.

Wrongful
withhold-
ing of
possession.

(Sav. Poss. 49; D. 43, 16, *de vi.*; 12 Marc.; 18 Pap. *pr.*) In the corresponding case in English law the tenant did not become actually seised. It was only a disseisin at the election of the landlord.

Interdict
de precario.

But upon a grant of land upon request (*precario*), which created a tenancy similar to a tenancy at will, the legal effect in regard to possession was different. The *possessio* passed to the tenant, and if he refused to deliver up the land on demand, the landlord had against him the interdict *de precario*. (D. 43, 26, *de prec.*; Sav. Poss. 354.) By this remedy he or his heir (D. 43, 26, *de prec.*; 8 Ulp. 1; 12 Cels. 1) recovered possession from the tenant, and probably from the heir of the tenant. (*Ibid.*; 8 Ulp. 8; Savigny, Poss. 357.) The remedy may be explained in two ways. The original possession of the landlord gives him a *jus possessionis*. Out of this right the interest of the tenant is derived, and if he holds over after his interest has ceased by demand of possession, he violates the landlord's right of possession. The interdict is thus brought into line with the other possessory remedies. But the matter may also be treated as one of estoppel. If, it is said in the Digest, a person who could claim a thing as his own, chooses to take it from the possessor as tenant at will (*precario*), he is bound by such taking, for what he obtains is the possession which is another's. (D. 43, 26, *de prec.*; 22 Ven. *pr.*) In the present English law this latter principle supplies to a certain extent the want of a separate system of possessory remedies.

II.—Possessory Remedies in English Law.

Forms of
ouster.

It has been remarked above that in English law possessory actions were so numerous that an owner who was out of possession could usually obtain the redress he required

by their means. He did not, save under special circumstances, rely on his title as owner and bring a writ of right. He relied, in the first instance, on his *jus possessionis*, and considered which of the recognized species of injury had been done to it. These injuries were all included under the name of ouster, the various forms of ouster being disseisin, abatement, intrusion, and deforcement. (Black. Book III. Ch. 10.) Discontinuance was a form of deforcement, but the actions by which it was remedied were classed as proprietary. It will be convenient to state first the nature of the remedies for disseisin, for abatement and intrusion, and for deforcement respectively; and then to consider, with regard to all, the manner in which the defendant might justify the apparent wrong.

(1.) *Disseisin.*

The principal remedy for disseisin was the assize of novel disseisin, a remedy, says Bracton, "*multis vigiliis excogitatum et inventum . . . ut per summariam cognitionem absque magna juris solemnitate quasi per compendium negotium terminetur.*" (Vol. III. 38; f. 164.) The objections to the writ of right were the trial by battle and the numerous essoins, or excuses for delay, by which the trial might be postponed. As an alternative to trial by battle there was introduced trial by the great assize, but the manner of choosing the assize furnished additional opportunities for delay (Reeves, Hist. of Eng. Law, I. 189), and, though the Court had some power of control, the proceedings were extremely dilatory. The design of the assize of novel disseisin, and also of the assize of mort d'ancestor, was to avoid raising the question of right, and to deal instead with the mere question of fact: in the one case, whether the plaintiff had been disseised by the defendant; in the other, whether

Assize
of novel
disseisin.

the ancestor of the plaintiff had died seised. Such questions of fact were referred to a jury summoned by the sheriff, and the matter was disposed of summarily, no essoins being permitted. (Glanv. trans. by Beames, 304, 311, 339.)

The plain-
tiff's case.

By the writ of novel disseisin the plaintiff complained that the tenant had unlawfully disseised him of his freehold—" *injuste et sine judicio disseisivit eum de libero tenemento suo.*" The disseisin was effected so soon as the claimant had been dispossessed against his will; and dispossession, as in the Roman law, took place whenever a person seised, or an agent or a member of his family in seisin—for with Bracton *in seisina* is equivalent to *in possessione*—in his name, was in any way ejected, or if, being absent at the time of the entry by the stranger, he was subsequently prevented from returning. A disturbance in the user of the land, too, might amount to a disseisin (Bracton, Vol. III. 16; f. 161 b); though, if it fell short of dispossession, it would be a disseisin only for the purpose of the assize, a disseisin, that is, at election. But to be disseised the claimant must have been seised, and this is implied, too, in the statement that he had been disseised "of his freehold." How such seisin was acquired has been shown above (*ante*, Chap. III.); and, in the case of a disseisor, Bracton did not allow his seisin to be complete until the disseisee's right of entry was gone. When this had happened the disseisee lost as well his civil as his natural possession, and could only reinstate himself by means of an assize. (Bracton, III. 30; f. 163 b.) If, then, the terms of the writ had been strictly followed, it appears that, until the disseisor had acquired this perfect seisin, he had no freehold, and could not truly say that he had been disseised of his freehold. He would therefore fail as against a mere stranger as much as against the disseisee. But the law adopted the

principle that possession ought to be universally protected save as against a person having right to enter, even though such protection might not be strictly consistent with the terms of the writ. If, it is said in one place, a possessor has no right of holding, yet a stranger has no right to eject him (Bracton, III. 274; f. 196; cf. III. 384; f. 209 b); and copying the words of Paulus already quoted (D. 43, 17, *uti poss.* 2), Bracton observes elsewhere (III. 270; f. 196) that, under whatever circumstances a man is in possession, whether of his own property or another's, and whether lawfully or unlawfully, from the mere fact that he is in possession, he has more right (*plus juris*) than one who is out of possession and has no right. And this doctrine was applied in practice by refusing to allow a stranger to plead want of freehold in the disseisee. Although, says Bracton, a man is possessing unlawfully, and so would have no action against the true owner, yet he will have an assize against such as have no right, and his want of freehold cannot be pleaded against him. (Bracton, III. 42; f. 165; and cf. III. 388, f. 210, where a disseisor is spoken of as having a quasi-freehold against him who has no right.) But though the claimant in an assize need not show a complete seisin in himself, his possession must be such as may ripen into seisin; he must not, for instance, be merely tenant for years.

Concurrently with the assize of novel disseisin there lay a writ of entry *sur disseisin*. (Booth's Real Actions, p. 174.) Writs of entry bore a considerable resemblance to the writ of right, and were adapted from it for the purpose of referring to a jury cases of wrong to the *jus possessionis*. It seems at times to be doubtful whether they were in their nature proprietary or possessory, but in later times they were possessory, and this is apparent from the fact that in a writ of entry the possessor might recover

Writ of
entry *sur*
disseisin.

against the true owner. They were the special remedy for deforcement, or wrongful continuance in possession, and under that head they will be further considered. But there was a writ of entry *sur disseisin*, in which the claimant complained, exactly as in an assize, that the tenant had disseised him of his freehold, and which was said, therefore, to be in the nature of an assize. As a concurrent remedy it was, perhaps, not necessary. (Cf. Booth, p. 172.) Its value lay in the fact that it could be adapted so as to enable the claimant to recover possession from persons against whom an assize would not lie.

Parties.

The judgment in the assize of novel disseisin was said to be threefold: restitutory, directing the claimant to be put in seisin of the land; penal, punishing the disseisor by fine and imprisonment for the violence; and in damages for the unlawful detention. (Bracton, III. 14; f. 161 b.) And being thus penal, it was at first confined to the disseisor and disseisee. Hence, it did not lie in favour of the heir of the disseisee, though, as to the disseisor, the term was extended by Bracton to include not only the actual disseisor, but also the tenant at the time the civil possession was terminated. Not till then was the disseisin complete. Consequently the feoffee of the disseisor, or a subsequent disseisor, then holding the land, was liable. (III. 34; f. 164.)

But this restriction as to parties did not accord with the real scope of possessory actions in English law. It might suffice in an action which was analogous to the interdict *unde vi*, and which aimed merely at protecting an existing possession and punishing the aggressor. It did not suffice to assert the *jus possessionis* when this was no longer merely personal, but was practically a right of property, and when possessory actions had been adopted as the ordinary remedies for an owner. It was necessary to make the

possessory action avail for persons claiming under the disseisee, and against persons claiming under the disseisor, and also against subsequent disseisors. Some change was made in this direction in the assize of novel disseisin (cf. per Lord Mansfield, *Taylor v. Horde*, 2 Sm. L. C. 9th ed. p. 704); but the extension was only fully carried out by writs of entry. In allowing the writ to the heir of the disseisee there was no difficulty. He simply alleged the injury to his ancestor's seisin instead of his own (Braeton, Vol. II. p. 455; f. 218 b; cf. Booth, p. 175); and so, where the disseisor himself was no longer in possession, the case was met by some special form of the writ. If the tenant claimed *through* the disseisor immediately, this fact was stated, and the writ was said to be in the *per*; if *through* some person to whom the disseisor had granted the land, these facts were stated, and it was in the *per* and *cui*. At common law the remedy extended no further, but by statute (Statute of Marlebridge, 52 Hen. III. c. 30; 2 Inst. 153) a writ of entry might be brought in the *post*, however many changes had taken place in the possession, the allegation being that the tenant had entered *after* the original disseisin (Co. Litt. 238 b; Black. Bk. III. Ch. 10; Booth, pp. 175, 176); and this included the case of a subsequent disseisin.

(2.) *Abatement and Intrusion.*

Owing to the division of the fee into successive estates, the English law had to provide for two cases of unlawful entry on the death of the person seised, namely, on the death of a tenant in fee, and on the death of the tenant of a particular estate. The entry of a stranger before the heir or devisee in the former case was called an abatement; his entry before the remainderman in the latter, an intrusion. "An intrusion," says Blackstone (Bk. III.

Abate-
ment and
intrusion.

Ch. 10), "is always immediately consequent upon the termination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee simple." In the case of abatement upon an heir the recognition of the wrong shows also that the heir has a right. He has a right of possession founded on the possession of his ancestor; or more strictly, his ancestor's *jus possessionis* has descended to him. But the English law, while speaking of *jus possessionis*, did not always take the strict analytical view. To secure recognition of the wrong it was necessary that there should have been a violation, not of a mere right, but of an existing seisin, and hence a seisin in law was ascribed to the heir. This is said to be not a mere right to possess, but a presumption of actual possession. (Williams on Seisin, 53.) Thus the English law adopts the fiction which Savigny suggested would support a possessory action by the heir, but which he failed to find in the Roman law. (*Ante*, p. 83.) Similarly a seisin in law was ascribed to the remainderman. It was by virtue of this seisin in law that abatement and intrusion were regarded as violations of an existing seisin, and were therefore classed as disseisins (in the wider sense of the word, 2 Sm. L. C. 9th ed. p. 710, note).

Assize of
mort
d'ancestor.

The proper remedy for abatement was the assize of mort d'ancestor. This lay in favour of the heir, where his predecessor, being a father, mother, brother, sister, uncle, aunt, nephew, or niece, died seised, and a stranger entered. The heir had to prove that his predecessor was seised in fee at the time of death; that he died within the time of limitation; and that he himself was the next heir. (Booth's Real Actions, 207.) The first point concerned possession merely, not title. Indeed, it is expressly said that the writ lay, although the predecessor was in by disseisin. (*Ibid.*) When the predecessor was a kinsman

of remoter degree, a similar remedy was provided by the writs of aiel, besaiel, and cozenage.

Concurrently with these remedies lay a writ of entry *sur abatement*, which, like other writs of entry, could be brought against the original abator, or in the degrees—the *per*, the *per* and *cui*, and the *post*—against others holding the land after him. When the assize and the other writs just mentioned became obsolete, this remained as the sole remedy. An example of its use occurs in 1795. (*Smith v. Coffin*, 2 H. Bl. 444.) For the case of intrusion a writ of entry *sur intrusion* was allowed in favour of the remainderman or reversioner. (Booth, p. 181.)

Writs of entry:
sur abatement;

sur intrusion.

(3.) *Deforcement and Discontinuance.*

The early English law recognized numerous cases in which a possession lawfully acquired might be unlawfully continued. The estate taken by the tenant of the land might either have been originally of limited duration, or, though unlimited, it might have been taken under circumstances which precluded his retaining it. Thus the grant might be voidable for some incapacity in the grantor or fault in the grantee; or it might fail by reason of the insufficiency of the estate of the grantor. A further case arose where an heir kept the widow out of her dower, or a co-heir out of his share of the inheritance.

Unlawful continuance in possession.

The appropriate remedy for wrongful continuance in possession was a writ of entry, as, for instance, the writ of entry *ad terminum qui præterit*, which lay against a lessee, whether for years or for life, who held over after the expiration of his term. Writs of entry are classed by Bracton with proprietary actions (Vol. V. 2; f. 318), but they differed from a writ of right in that issue was taken not on the mere right, but on the fact of holding over; and this was a matter which might be submitted to a

Writs of entry.

jury. So in a writ of entry *sur disseisin*, issue was taken on the disseisin. Further, there was a slight restriction in the admission of essoins, the essoin *de malo lecti* not being allowed.

Turning writ of entry to writ of right, and *vice versa*.

Originally, however, the holding over was only referred to a jury if the circumstances which showed it to be unlawful could be proved by the actual sight and hearing of the witnesses ; in other words, where the terms of the grant and the entry under it could be proved by living testimony. If it was necessary to have recourse to traditional testimony, the writ was said to be turned into a writ of right, and the mere right was then determined by battle or the great assize. (Bracton V. 9 ; f. 318 b.) Conversely, the claimant, by offering suitable proof, might turn his writ of right to a writ of entry, but this required the consent of the tenant, who might elect whether to put himself on a jury concerning the entry, or determine the right by battle or the great assize. So the tenant, by setting up a feoffment to himself from the ancestor of the claimant, might turn the writ of entry into a writ of right, and join issue whether he had greater right by reason of the feoffment, or whether the claimant ought to hold the land.

Writ of entry a possessory remedy.

It is said that the claimant must not, as in the count on a writ of right, allege seisin in his own demesne as of fee and the taking of esplees, or here, too, the tenant may treat the writ as a writ of right, and defend by battle or the great assize. He must only claim the land as his possessory right, if he held for life, or as his inheritance, if he held in fee. But in later times this distinction was neglected, and the pleadings in a writ of entry might allege seisin as of fee and of right by the taking of esplees. (See, for example, Booth, *Real Actions*, 177.) On the other hand, writs of entry ceased to be liable to be changed into writs of right. They were classed with

possessory actions, and this was in accordance with their real nature. They are brought upon the right of possession, and they allege a specific violation of such right. The violation may be a disseisin, abatement, or intrusion, as in the writs of entry denoted by these terms; or the violation may be a holding over after the termination of an estate taken under a grantor who had the right of possession, as in the writ of entry *ad terminum qui præterit* and other writs about to be mentioned. In any of these cases the disseisor, or some person claiming under him, may succeed against the disseisee. In the case of holding over on the termination of a limited estate, the right of the grantor to recover against the grantee is commonly put on the ground that the grantee is estopped from disputing the grantor's title. Perhaps this circumstance has tended somewhat to obscure the true nature of writs of entry as actions simply possessory.

Besides the writ of entry *ad terminum qui præterit* for holding over by a tenant under a grant for life or years, writs of a similar nature were provided for all ordinary cases of holding over after the avoidance or other termination of an estate taken under a grant from the person actually seised. Where the grant had been made by a lunatic, possibly the lunatic himself, but at any rate his heir, could recover by a writ of entry *dum non fuit compos mentis*; where by an infant, the infant, on attaining twenty-one, recovered by the writ *dum fuit infra ætatem*. An instance of failure of the grant from default in the grantee arose where a woman had given a man lands in fee or in tail to marry her in convenient time. If he failed to do so, she recovered by the writ of entry *causa matrimonii præloenti*. A feoffment in fee made by a tenant for life, in dower, or by the curtesy, conferred, of course, only a defeasible estate as against the remainderman or other person entitled on the

Holding over after avoidance or other termination of estate.

death of the feoffor. If he waited until such death, he had a writ of entry at common law, hence called the writ *ad communem legem*. But though such feoffment was a cause of forfeiture, and gave the remainderman an immediate right of entry, he had during the life of the feoffor no action. In the case of tenant in dower, this defect was supplied by the Statute of Gloucester, and a writ was given known as the writ of entry *in casu prorsus*. Subsequently, in analogy to this, a writ *in consimili casu* under the Statute of Westminster II. c. 24, was allowed for the case of alienation by a tenant for life or by the curtesy. (Booth, 200.) Similar to the position of a remainderman was that of a married woman whose lands had been alienated by her husband. Upon the termination of the marriage by divorce she recovered the lands by a writ of entry *cui ante divorcium*, or her heir recovered them by a *sur cui ante divorcium*. Upon its termination by the death of the husband the writs were *cui in vita* and *sur cui in vita* respectively.

Discon-
tinuance.

In principle the case of alienation by a tenant in tail was the same as that of alienation by any other limited owner, but it was treated differently. It effected a discontinuance of the estate tail, with the result that the estate could only be restored by action, and consequently the issue had, upon the death of the tenant in tail, no right of entry. And even then they did not recover by a writ of entry, but by a *formedon*, an action which was ranked with proprietary, not with possessory actions.

Holding
over
against
widow or
co-heir.

Where an heir entered and refused to assign the widow her dower, or a co-heir entered and refused to share the land with his co-heirs, the case resembled abatement, save that the entry of the heir or co-heir was lawful. But the death of the ancestor gave the widow or other heirs as good a right as the heir so entering, and it was a deforcement to

exclude them. The widow, however, had no remedy which was recognized as possessory. She had to bring a writ of right, either a writ of right of dower, or of dower *unde nihil habet*. (Booth, 118, 166.) The *nuper obiit*, on the other hand, which was the remedy for the co-heir, seems to have been regarded as possessory. (Booth, 204.)

The above writs of entry stated the circumstances under which the tenant had entry into the land, and from which it appeared that his continuance on the land was wrongful. “They are called,” says Booth (Real Actions, 172), “writs of entry, not only because they speak of the entry of the tenant in the writ, but likewise show for what reason the possession ought not to be detained from the demandant.” Thus, a writ of entry *ad communem legem* upon alienation by tenant in dower claimed land into which the tenant had no entry save through the tenant in dower who was dead, the demandant at the same time alleging that he was heir to her husband. (Booth, 190.) But the reference to entry was not essential, and it was enough to state the facts which impeached the tenant’s possession. A writ *dum fuit infra ætatem* simply claimed the land which the demandant had granted to the defendant while he was of full age; a writ *ad terminum qui præteriiit* claimed land which had been demised to a tenant for a term which had expired. All these writs of entry, like the writ of entry *sur disseisin*, might be brought by a demandant upon the seisin of his ancestor, and by being framed in the *per*, the *per* and *cui*, or the *post*, might be brought against the actual holder of the land, although he was not the original wrongdoer.

Form of
writ of
entry.

(4.) *Defence to Possessory Actions.*

In stating the nature of a possessory action (*ante*, p. 77), it was said that the defendant in such an action cannot plead his title generally, although in some cases he is

Plea of
wrong
to defen-
dant's
earlier

right of
possession.

allowed to plead in justification of the wrong a previous wrong to his own possession, or, more accurately, to his own *jus possessionis*. In the Roman law such a plea was called an *exceptio vitiosæ possessionis*. In the English law it is sometimes said that the plaintiff may plead his title, but this is misleading. It does not mean that he may plead that he is owner; it means that he may establish a right of entry, and since such a right springs out of a violation of the *jus possessionis*, the principle is really the same as in the Roman law; the defendant alleges an earlier wrong to the right of possession on which he relies. It was a good plea, we are told, as well in an assize as in a writ of entry *sur disseisin*, that the defendant was seised of the land until by the plaintiff disseised, whereupon he re-entered. (Booth's Real Actions, pp. 180, 274.) The difference is that in English law the wrong need not have been done by the actual plaintiff in the possessory action. A disseisee has right of entry on the alienee or the disseisor of his disseisor. And, moreover, as a consequence of the more extended recognition of the *jus possessionis*—the *jus possessionis* being for many purposes placed on the footing of a right of property—the list of wrongs out of which a right of entry may arise is longer than in the Roman law. Right of entry springs not only out of a disseisin (*vi, clam*), or a withholding by a tenant at will (*precario*), but also out of an abatement, an intrusion, or any of the numerous cases of deforcement.

Right of
entry.

That right of entry springs out of a wrong to the *jus possessionis*, and is not confined to the true owner, is abundantly clear. In general it existed side by side with the right to bring a possessory action. In the case of disseisin Bracton calls it the "*primum et principale remedium*," and so in the case of the other wrongs to the right of possession described above. Sometimes, indeed, it was

the only remedy. A person whose right of possession was infringed, whether by unlawful entry, or by unlawful continuance in possession after a lawful entry, had always a right of entry, though the law might not give him a right of action. Thus, before the introduction of the writs of entry *in casu proviso* and *in consimili casu*, the remainderman or heir might treat an alienation by the tenant for life, or by the curtesy, or in dower, as a cause of forfeiture, and forthwith enter on the alienee, although, till the death of the limited owner, he had no right of action. And if a right of entry is given to B. in consequence of a wrong to his possessory right done by C., it is immaterial that B. is himself a wrongdoer against A. Of this numerous examples are to be found. If B. has disseised A., and is himself disseised by C. (Co. Litt. 277 a.), or makes a feoffment to C. on condition, and the condition is broken (Litt. s. 409), or, being an infant alienes to C. in fee (Litt. ss. 408, 478), in all these cases B. may enter on C. And if A., after his right of entry had gone, had entered on B., it is clear that B. might have re-entered.

The duration of the right of entry has been already noticed under the head of disseisin. With Bracton the right was no more than a right of fresh re-entry. It was to be exercised at once—*flagrante disseisina* (Bract. III. 24; f. 162), *incontinenti* (III. 348; f. 205)—and while it lasted the disseisin was not complete. The result is the same as in the interdict *unde vi* after the abolition of the *exceptiones vitiosæ possessionis*. But the tendency of the English law is the reverse of the Roman, and the plea of wrong to an earlier *jus possessionis*, or the defence of right of entry, is more and more allowed. Professor Maitland has shown (L. Q. R. IV. 286) how at first the right of entry is allowed against the disseisor, though not against one

Duration
of right
of entry

who takes under him by title, either as feoffee or heir. Then the feoffee is deemed to be a party to the wrong, and the right of entry is allowed against him, unless he has been in possession for a year and a day. (Co. Litt. 237 b.) Ultimately, the feoffee lost even this measure of protection, and right of entry was denied to the disseisee only as against the heir of the disseisor. At the same time, although down to 1833 right of entry was always liable to be tolled by a descent cast, it was frequently kept alive by continual claim.

Effect of
descent
cast on
pleadings.

When once the plea of wrong to an earlier possession—the *exceptio vitiosæ possessionis*—was allowed, it was allowed equally to each side. After the defendant's plea, the plaintiff had his replication, the defendant his rejoinder, and so on. In these pleadings each party could trace back the defects of his opponent's *jus possessionis*, until some fact was reached upon which they were at issue. In practice these pleadings were limited by the doctrine of descent cast. Before long one party would probably plead a dying seised, and as this *prima facie* showed a complete *jus possessionis* in him, the next step on the opposite side was correspondingly restricted.

Pleas to
descent
cast.

The other party might plead a continual claim, and so avoid the effect of the descent cast. An interesting example of this is given in Rastell. (Entries, 275 a.) In a writ of entry *sur disseisin*, T. complained that W. S. had unjustly and without judgment disseised him of a certain manor with the appurtenances. Plea, that before T. had anything in the manor one W. A. [W. W. in the text, but this seems to be a misprint] was seised in his demesne as of fee and enfeoffed W. S. in fee. Express colour is then given to T.'s claim by the fictitious averment of a previous charter to T., by which, for want of possession in the grantor, nothing passed. This being

matter of law, the case was thus removed from the jury and referred to the Court. (Stephens on Pleading, 2nd edit. 240.) The plea continues that T. entered on W. S. and W. S. re-entered. T., in his replication, admits this entry by him, and goes a step further back to justify it. Replication that before the feoffment to W. S., one W. W. was seised in fee, and died seised, leaving J. W. his heir. J. W. entered and enfeoffed T. in fee, and then W. S. committed the disseisin complained of. Rejoinder, that before W. W. had anything in the land, W. A. was seised in his demesne as of fee, and was disseised by J. B. W. A. made continual claim. J. B. thus seised, enfeoffed W. W. in fee, and W. A.'s claim was continued during W. W.'s life. W. W. died, leaving J. W. his heir, who entered and enfeoffed T. Then W. A. entered and enfeoffed W. S. Hence the earliest right of entry is that of W. A., but this is lost by the descent cast on the death of W. W., unless kept alive by continual claim. T. accordingly puts in a rebutter traversing the continual claim.

So again, the other party might traverse the dying seised, or else, by alleging a more recent descent on his own side, might show that the *jus possessionis* has been transferred to him. In the last case, he was said to make a title at large. His opponent might then answer with the plea *veniat assisa super titulum*, and the recognitors thereupon inquired into all matters and circumstances concerning the title. (Booth's Real Actions, 213.) By "title" here is to be understood title under the *jus possessionis*, not the mere right.

The above remarks contemplate the case where the wrong complained of in the assize or writ of entry was an unlawful entry—a disseisin, an abatement, or an intrusion. Where it was a deforcement—a wrongful continuance in possession—the defendant could deny the facts alleged. For instance, in a writ of entry *dum non fuit compos*, he

Defence
in action
grounded
on wrong-
ful con-
tinuance
in posses-
sion.

could traverse the *non compos mentis*. (Booth, p. 189.) But he could not, while admitting the plaintiff's allegations, set up a right of property in himself, and claim to continue in possession in virtue of such right. This is simply another way of saying that a writ of entry *sur deforcement* was a possessory action. The plaintiff relied upon the *jus possessionis*, or seisin in fee, whether tortious or not, out of which the limited or defeasible estate of the tenant had been derived, and against this no *jus proprietatis* in the tenant could be alleged. At the same time the tenant might under certain circumstances take the same defence as in other possessory actions. He might allege a previous wrong to his own possession, conferring a right of entry on himself. In this case, unless he had accepted the limited or defeasible estate by deed so as to be estopped by the deed, his original right of entry justified his continuance in possession. This seems to be the true explanation of the circumstance that right of entry at the time of the acceptance of the limited or defeasible estate was a good defence to an action for the recovery of possession upon the termination of the estate, though in practice the case was treated as an instance of the doctrine of remitter. The grantee of the limited or defeasible estate was not forbidden to set up a right of property, on the ground that the action was merely possessory; but he was said to be estopped from disputing the title of the grantor, and this estoppel arose out of the mere acceptance of the estate, and was not confined to the case of a grant by deed. But if at the time of the creation of the estate (provided it was not created by deed) the grantee had a right of entry, he was then remitted to his earlier title, and the estoppel did not arise.

Remitter. The strictness of possessory actions in excluding any earlier title which was not accompanied by right of entry

was modified by the doctrine of remitter. By virtue of this doctrine a tenant, A., whose estate was defeasible by the entry, or at the suit of B., but who was also entitled by virtue of an earlier seisin in fee, as against which B.'s estate was wrongful, might, under certain circumstances, use his earlier title to defeat B.'s right of entry or right to a possessory action. "Remitter," says Littleton (sect. 659), "is an ancient term in the law, and is where a man hath two titles to lands or tenements, viz., one a more ancient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthy title." In other words, if there are three titles, X, Y, and Z, Y wrongful as regards X, and Z as regards Y, and if A., who is entitled to the land under title X, actually comes to the land under title Z, he may be deemed to be in under his earlier and better title X. It is not necessary, indeed, that title Z should be wrongful as regards title Y. If a disseisor aliens in fee to the disseisee, this may be a remitter to the disseisee. (Litt. s. 693.) And so there need not be three distinct titles. If tenant in tail discontinues the estate tail by enfeoffing his son in fee, on the death of tenant in tail the son is remitted to the estate tail. (Sect. 660.) But for our present purpose it is convenient to assume three titles, each of the last two wrongful as regards the one immediately preceding it. Consequently Z must have arisen by a disseisin against B, or if taken under Y, its continuance must be a deforcement.

A remitter after a disseisin might take place under the following circumstances. Suppose A., seised in fee, to be disseised by B., and B. to die seised, leaving D. his heir, who enters. A.'s right of entry is now gone, and if he ejects D., this is a disseisin for which D. could recover in

Remitter
after
disseisin.

an assize or writ of entry. But if, after such second disseisin, A. dies seised, leaving C. his heir, C. has two titles, his title X under A.'s earlier, and his title Z under A.'s later seisin. So far as Z is concerned, it is inferior to D.'s title Y, and D. could recover against him by a writ of entry *sur disseisin* in the *per*. But under the doctrine of remitter he is deemed to be in under title X, and may set this up as a defence to D.'s action. (Cf. Litt. s. 659.) And this favour is allowed him because he was himself no party to the second disseisin, that is, to the wrong under which title Z was created, but came to the land under that title by act of law. (Cf. Co. Litt. 347 b, n. (1); Black. Bk. III. Ch. 10.)

Remitter
upon hold-
ing over.

Next take the case where title Z is derived under title Y, but is for a limited estate or otherwise liable to be terminated. Upon such termination the person claiming under Y will, apart from remitter, obtain possession from the tenant under Z in an action based on deforcement. Thus, suppose A., a woman seised in fee (title X), to take a husband who alienes the land to B. in fee (title Y). B. lets the same land to the husband and wife for the term of their two lives (title Z), saving the reversion to himself and his heirs. Ordinarily B. would, on the failure of the lives, recover the land as against the heir of the wife, but under the circumstances the wife is remitted to her earlier title. A person *sui juris* who, having a good title to land, accepts an estate under a defeasible title does so at his peril. It is his "folly" to accept possession under a bad title when he had a good title which he might have asserted. But it is otherwise with a married woman. "No folly can be adjudged in the wife which is covert in such a case." (Litt. s. 666.) And so in the case of an infant. (Sect. 664.) Remitter, however, as pointed out above, is allowed in the case of an owner *sui juris*, provided he had a right of entry

when he accepted the terminable estate, and provided he did not take it under a deed indented so as to be estopped from disputing the title of his alienor. (Sect. 693.) The result as stated by Butler (Co. Litt. 347 b, note (1)), is that "there is no remitter where he who comes to the defeasible estate comes to it by his own act or his own assent. Hence, the defeasible estate to entitle the party to be remitted must be made to him during infancy or coverture, or must come to him by descent or act of law." To this must be added the case of remitter by virtue of right of entry.

CHAPTER VI.

THE ACTION OF EJECTMENT.

Action of
ejectment
substi-
tuted for
real
actions.

ALL the actions mentioned in the previous chapter were founded upon seisin, and were available only for a claimant who was entitled to recover seisin. The ejectment of a lessee was a disseisin of the freeholder, and the latter had his remedy by assize or writ of entry; but the lessee, being merely possessed, had no means of recovering possession, and his only remedy against the disseisor was in damages for the trespass by the writ of *ejectione firmæ*. (Blackst. Bk. III. Ch. 11.) In the reign of Edward IV., however, it was held that upon this writ the lessee could recover his term as well, and the action having a double effect—the recovery of the term and the recovery of damages—it was called a mixed action in contrast to actions which were either purely real or purely personal. Subsequently it was found that the action afforded a ready means of determining the title of the freeholder. To recover the term the lessee must show that he had received a valid grant of it, and since at the time of the grant the lessor must have been in possession, this meant that he had right of entry. Any entry under such right would vest the possession in him. Ejectment, therefore, raised the question whether the lessor had title to the land accompanied by right of entry, and this might well be brought before the Court, although the lease itself was a fiction. Hence, the action of ejectment came to be used instead of real actions for the trial

of title to land, and so completely was the change effected that in the time of Elizabeth ejectment appears to have become the common form of action for this purpose. (Co. Litt. 239 a, note (1); Roscoe's Real Actions, II. 481; Reeves' Hist. of Eng. Law, III. 759 n.)

In the first instance the proceedings connected with the lease, even when they were designed solely to bring in question the freehold title, were real proceedings. The actual plaintiff entered upon the land and made a lease to A., who at the same time entered under the lease. A. was then ejected by a third person B., called the casual ejector. For the ejectment A. brought his action against B. and obtained judgment to recover the term and damages. He enforced the judgment by a writ of possession. All this went on in the absence of the real owner of the land, who might in consequence find himself suddenly turned out of possession by the sheriff, and, when the action came to be used in this manner, it was necessary to give him a chance of coming in to defend. But the Courts at the same time took occasion to make the non-essential parts of the procedure purely fictitious. The points to be proved to maintain the action were the title of the lessor, the lease to A., A.'s entry or possession under the lease, and his ouster by B. The last three, however, were quite irrelevant to the determination of the first, and in the seventeenth century the practice was introduced of allowing the possessor of the land to come in and defend upon terms of confessing the lease, entry, and ouster. For this purpose he entered into a rule of court called the consent rule, and the trial then took place on the title.

It might well happen that title to the land existed although the right of entry had been lost by a descent or discontinuance, or by the bar of the Statute of Limitations, and then a real action would have been the only

The consent rule.

Action depended on right of entry.

remedy. Such cases must have frequently occurred, and it has been remarked as singular that, with this defect in the action of ejectment, real actions should have gone so much out of use. (Co. Litt. 239 a, note (1).) At the beginning of the present century an attempt seems to have been made to revive them (*ibid.*), and a case of a writ of right is to be found so late as 1838. (*Davies v. Lowndes*, 5 Bing. N. C. 161; see *Jayne v. Price*, 1814, 5 Taunt. 326.) But when, in 1833, rights of entry ceased to be liable to be tolled, except by a lapse of time which also destroyed the right of property, the action of ejectment became more efficacious, and it was considered safe to abolish, with certain slight exceptions, the old real actions, both proprietary and possessory, and to leave ejectment as the only means of asserting title to land.

Title in
ejectment.

It is commonly said that in ejectment the plaintiff recovers on the strength of his own title, not on the weakness of the defendant's. (*Martin v. Strachan*, 1743, 5 T. R. 107; *Goodtitle v. Baldwin*, 1809, 11 East, p. 495.) "In this action," said Lord Mansfield in *Roe v. Harvey* (1769, 4 Burr. p. 2487), "the plaintiff cannot recover, but upon the strength of his own title. He cannot found his claim upon the weakness of the defendant's title. For possession gives the defendant a right against every man who cannot show a good title." The rule, however, states nothing as to the nature of the title which the plaintiff must show; it only requires that the plaintiff must strictly prove the title on which he himself relies, without in any way seeking assistance from the defendant's want of title; and, in fact, it does no more than impose on the plaintiff in ejectment the same burden as is imposed on the plaintiff in any other action. He must prove his case. If he has himself been in possession, the rule does not say that such possession cannot by itself give him a title; but, if he has

not been in possession, he must prove that the title of some previous possessor—whether merely possessory or not—is vested in him. It was a failure in this latter point that called forth Lord Mansfield's statement of the rule in *Roe v. Harvey*. Neither Mrs. Haldane nor Urry, the two lessors of the plaintiff, had been in possession, but Mrs. Haldane claimed as devisee under the will of a previous owner. Had Urry been out of the way her title would have been established. One of the plaintiff's witnesses, however, stated that Mrs. Haldane had conveyed her interest to Urry, and that the deed was in Court. Hereupon the defendant insisted that the deed should be produced, and, this not being done, the plaintiff was non-suited. Upon a motion for a new trial the majority of the King's Bench held that the plaintiff, by his own witness, had proved he had no title under Mrs. Haldane, and he had not proved a title under Urry. Hence the non-suit was right. The result is adversely criticized in the note to *Doe v. Billyard* (3 Man & Ry. p. 113), and it is suggested that the dissenting opinion of Yates, J., was correct, namely, that the plaintiff was not bound to produce the deed, and that the question, whether he had shown a title, should have been left to the jury. Where, on the other hand, it is sufficiently proved that the title is in one or other of two persons under each of whom the plaintiff claims, he can recover. In *Doe v. Parke* (1836, 4 A. & E. 816), the title was either in the heir-at-law or the assignees of a bankrupt, and it was held that the plaintiff who claimed on the demise of the heir-at-law and also of the assignees was entitled to recover.

But for the decision in *Davison v. Gent* (1857, 1 H. & N. 744) presently to be mentioned, it would appear to be correct to say that bare possession does not give the possessor a title to recover in ejectment, even as against

Possession
not a title
in eject-
ment.

a mere wrong-doer, that is, as against a person who enters without any apparent title. In *Hawkins' Pleas of the Crown* (I. 510), where it is said that "bare possession is a good title against all persons except him who hath the right," the author is insisting that possession can lawfully be maintained against strangers, not that it gives a title to recover in ejectment. In *Allen v. Rivington* (1671, 2 Saund. 110 a), indeed, it was held that priority of possession alone gives a title to the plaintiff in ejectment against the defendant and all the world except the true owner; and in *Asher v. Whitlock* (1865, L. R. 1 Q. B. 1), Cockburn, C.J., speaking of the plaintiff's title in ejectment, said that possession was "good title against all but the true owner." But *Allen v. Rivington* does not seem to have been accepted as an authority, and in *Asher v. Whitlock* the possession was treated, not as bare possession—that is, trespass-possession—but as the possession of a disseisor. It was, therefore, accompanied by seisin in fee, and the seisin in fee was the title. That ejectment and trespass stand in this respect on a different footing was expressly laid down in *Doe v. Barnard* (1849, 13 Q. B. 945). Possession, said Patteson, J., in delivering the judgment of the Court, is not sufficient in ejectment as in trespass to maintain the action, and this authority was followed in *Nagle v. Shea* (1874, Ir. R. 8 C. L. 224). The distinction is illustrated by *Doe v. Barber* (1788, 2 T. R. 749). A lease of a rectory house taken from the rector became void under 13 Eliz. c. 20 by reason of the non-residence of the rector for eighty days. The defendant entered upon the lessee without any colour of title, and in ejectment by the lessee it was held that though the defendant was a stranger and a wrong-doer, the lessee could not recover. He could clearly have recovered in trespass.

To say that mere possession does not give a title to recover in ejectment is by no means the same as saying that the plaintiff in ejectment must show a title good against the world. Ejectment has always been regarded as a possessory action, and it is possessory, not only in the sense that the action, being for possession and not for a declaration of title, must be brought against the actual occupier (*Gledhill v. Hunter*, 1880, 14 Ch. D. 496); but in the sense that it could formerly be brought on the right of possession as opposed to the right of property, and consequently stood upon the same footing as the old possessory real actions. Ejectment, says Blackstone (Book III. Ch. 11), "is founded on the same principle as the ancient writs of assize, being calculated to try the mere possessory title to an estate." Thus if, after a disseisin, the entry of the disseisee was taken away by a descent cast or the statute, and the disseisee nevertheless entered, the heir of the disseisor, or the disseisor himself, as the case might be, who had now a complete *jus possessionis*, would recover in ejectment, notwithstanding that in a writ of right judgment must have been for the disseisee. (*Smith v. Tyndal*, 1706, 2 Salk. 685; cf. Preston on Abstracts, II. 294.) At the present time there can be no *jus possessionis* complete against the person lawfully entitled, and the distinction between the right of possession and the right of property has passed away with the old real actions in which they were respectively asserted. But it is still useful to refer to this view of ejectment. Probably, as I have above attempted to show, seisin in fee, though tortious, gave a right of property which could be successfully asserted in a writ of right as against strangers. Certainly it gave a right of possession which could be asserted in a possessory real action, and therefore also in ejectment.

Seisin in fee, though tortious, a title against strangers.

*Asher v.
Whitlock.*

This view of ejectment is supported by the judgment of Cockburn, C.J., in *Asher v. Whitlock* (1865, L. R. 1 Q. B. 1). At Michaelmas, 1842, Thomas Williamson inclosed from the waste of a manor a piece of land by the side of the highway. In 1850 he inclosed more land adjoining, and built a cottage. He occupied the whole till his death, in 1860. By his will he devised the premises to his wife for life, while unmarried, and then to his daughter, Mary Ann Williamson, in fee. After the death of the testator, his widow remained in possession with the daughter, and in April, 1861, married the defendant. From that time they all three resided on the premises till the death of the daughter, in February, 1863. On her death the defendant and his wife, the widow of the testator, continued to reside on the premises; the widow died in May, 1863, and ejectment was brought, in 1865, by the heir-at-law of the daughter. Against him it was urged that the case was that of two trespassers, and that the one last in possession was entitled to keep the land until the person having title ejected him. But Cockburn, C.J., treated the testator and the defendant as successive disseisors, and in the course of the argument observed that, under the old law, the disseisor had a good title against all but the disseisee. In his judgment he said: "I take it as clearly established, that possession is good as against all the world, except the person who can show a good title; and it would be mischievous to change this established doctrine. . . . Suppose the person who originally inclosed the land had been expelled by the defendant, or the defendant had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him, 'You have no more title than I have, my possession is as good as yours,' surely ejectment could have been maintained by the original possessor against the

defendant. *All the old law on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee.* It is too clear to admit of doubt that, if the devisor had been turned out of possession, he could have maintained ejectment." And the estate which was thus good against all the world but the true owner, the disseisor could devise, conferring his own right on the devisee. "The devisor might have brought ejectment, his right of possession being passed by will to his daughter, she could have maintained ejectment, and so, therefore, can her heir. . . . On the simple ground that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed."

For the present it is sufficient to construe this last sentence as referring only to the possession of a disseisor. The tortious seisin of the disseisor gave him a right of possession for any infringement of which an assize or writ of entry would lie, and equally the disseisor might bring ejectment. At the same time it is to be noticed that disseisin was not found as a fact, and it is not clear that, under the old law, Thomas Williamson would have been regarded as a disseisor. It may be that Cockburn, C.J., was intending to put any possessor, in whose favour the statute is running, on the footing of a disseisor, and upon this supposition the case will be used subsequently in favour of the theory that a change has taken place in the nature of the possession upon which the right of possession for the purpose of ejectment is based. (*Post*, p. 124.)

The result so far is, that bare possession does not give a title to recover in ejectment; seisin in fee, although tortious, does. In other words, the plaintiff in ejectment may recover on his title to possess as against the defendant, although a better right to possess is outstanding in a third person. This proposition, perhaps, is not consistent

Old rule as to twenty years' possession.

i. Evidence of complete right of possession.

with some of the authorities. Lord Holt seems to have considered that the plaintiff must have a complete *jus possessionis*, and upon this ground he allowed twenty years' possession to give a good title. In *Stokes v. Berry* (1699, 2 Salk. 421), he ruled that if A. has had possession of land for twenty years without interruption, and then B. gets possession, upon which A. is put to his ejectment, though A. is plaintiff, yet the possession of twenty years is a good title in him, as if he had still been in possession; and in another case (*ibid.*) he gave as the reason, "because a possession for twenty years is like a descent which tolls entry, and gives a right of possession which is sufficient to maintain ejectment." But it is clear that a disseisor had a right of possession on which he might maintain ejectment against strangers immediately upon the disseisin, and that he was not bound to wait until, by the tolling of the entry of the disseisee, his right of possession was complete.

ii. Evidence of perfect title.

Later authorities speak as though the plaintiff was bound to show not merely a right of possession but a right of property good against the world. Consequently he was liable to be defeated if by any means it appeared that the real title was in a third person. "It is sufficient," it is said, "if the defendant can show the real title to the land to be out of the lessor of the plaintiff. (Roscoe's Real Actions, II. 488; cf. Adams on Ejectment, 28; note to *Doe v. Billyard*, 3 Man. & Ry. p. 113.) If by "real title" is meant the title of the true owner, these passages must be wrong; otherwise, how could the disseisor recover in ejectment against the disseisee after the entry of the latter was tolled? Possibly they are to be understood as referring only to the legal estate, for it was well settled that the plaintiff must be defeated if the defendant showed that the legal estate was outstanding. In other words the

defendant could set up an outstanding estate; he could not set up an outstanding right of entry. If it was ever really thought that the plaintiff in ejectment must show a title good against the world, this would sufficiently account for the selection of twenty years as the period which would raise a presumption of such a title. Such period did not bar the real actions that might be brought in respect of an outstanding right, but it barred ejectment and rendered it improbable that any such right would ever be asserted.

Another explanation of the period in question is that, in the absence of any evidence as to the title under which the possession was held, twenty years' possession was evidence of seisin in fee. "If no other title appears," said Lord Mansfield in *Denn v. Barnard* (1777, Cowp. 595), "a clear possession of twenty years is evidence of a fee." In that case the suggestion was that the plaintiff was really entitled under a term of 2,000 years, and that the deed creating the term ought to be produced. But Lord Mansfield held that, if such a term existed, it would probably be merely a term attendant on the inheritance, and its existence did not interfere with the presumption of a fee arising from twenty years' possession. In the case of possession by a feoffee, the same period was required to raise a presumption of livery of seisin, if no direct evidence of livery was obtainable. (*Doe v. Cleveland*, 1829, 9 B. & C. 864; *Doe v. Davies*, 1837, 2 M. & W. 503.) But whatever was the exact meaning of the period of twenty years, whether it was treated as giving a complete right of possession, or as raising a presumption of an absolute right to possess, or of seisin in fee which, whether accompanied by an absolute right to possess or not, at any rate gave a right against strangers, it is clear that twenty years' possession gave a good title in ejectment, and,

iii. Evidence of seisin in fee.

apparently, where possession only was relied on, this period was not only sufficient, but was essential. (*Lewis v. Price*, 1761, 2 Wms. Saund. 175 a; *Doe v. Parke*, 1836, 4 A. & E. p. 818; *Doe v. Cooke*, 1831, 7 Bing. 346; *Doe v. Barnard*, 1849, 13 Q. B. 945.)

Twenty
years not
now re-
quired for
presump-
tion of
title.

But in recent times the requirement of twenty years' possession has not been insisted upon, and if possession is to be regarded at all as evidence of title, there is no reason why possession for a shorter period should not serve. The duration of possession affects the weight of the evidence, not its nature. (*Doe v. Dyball*, 1829, Moo. & M. 346, note.) In *Doe v. Webber* (1834, 1 A. & E. 119), possession from 1815 till about 1825 was held to give a title against a defendant who had had a subsequent possession for several years, and the same principle was carried further in *Doe v. Dyball* (*supra*) and *Doe v. Martin* (1841, Car. & M. 32). In *Doe v. Dyball* the plaintiff proved a year's possession under a lease, and rested his case there without further proof of his lessor's title: in *Doe v. Martin* he proved receipt of rent for a year. In each case it was held that there was sufficient evidence of title against a mere wrongdoer, and they apparently establish that any substantial possession, however short, affords such evidence. In *Doe v. Barnard* (1849, 13 Q. B. 945), it was said, on the authority of these cases, that possession was "*primâ facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee."

Correct
rule that
possession
is evidence
of seisin
in fee.

These vague references to "title," however, seem to be misleading. They mean that possession is evidence of right to possess, but when a plaintiff alleges right to possess he must show the interest in the land which gives him this right, and it is by virtue of such interest he recovers. The correct rule is that possession is evidence of seisin in fee (*Asher v. Whitlock*, 1865, L. R. 1 Q. B. 6;

Peaceable v. Watson, 1811, 4 Taunt. 17), and the seisin in fee constitutes the plaintiff's title. If it appears that he has any other interest, he must show how such interest is derived under a seisin in fee. In *Doe v. Dyball*, the granting of the lease and possession under it were evidence of the lessor's seisin in fee, and the lease was the plaintiff's immediate title. It has been said that the same rule does not apply when title is pleaded by way of justification in trespass, and that the defendant, to support a plea of *liberum tenementum*, must show either a paper title, or a possession for twenty years. (*Brest v. Lever*, 1841, 7 M. & W. 593; note to *Allen v. Rivington*, 1671, 2 Wms. Saund. 110 a.) But this may be doubted. The fact that the short possession of A. has been followed by the possession of B. may be evidence to rebut the presumption that A. was seised in fee, but the presumption arises in the first instance whether A. is plaintiff in ejectment or defendant in trespass.

The presumption of a seisin in fee may be rebutted in various ways. It is rebutted if there are other circumstances which raise a stronger presumption that the possession was held in respect of some smaller interest, as in respect of a life estate. In *Jayne v. Price* (1814, 5 Taunt. 326), Ann Jayne was shown to have been in possession or in receipt of the rents of certain land until her death, forty-two years before the action. After her death her daughter entered and held for her life—fourteen or fifteen years—and then persons claiming through her. Ultimately the heir-at-law of Ann Jayne brought a writ of right, and relied on her possession as evidence that she had been seised in fee. But it was held that under the circumstances the proper presumption was that she had only a life estate, remainder to her daughter, and a similar decision was given in *Doe v. Billyard* (1828, 3 Man. & Ry. 111). The presumption of

Rebuttal
of pre-
sumption
of seisin
in fee.

seisin in fee is also rebutted by showing some other actual title in the possessor, as that he was tenant at will. (See per Mellor, J., in *Asher v. Whitlock*, 1865, L. R. 1 Q. B. p. 6.) This would not necessarily affect his own title to recover possession, but would effectually defeat the title of his heir or devisee. If he were shown to be tenant at sufferance—that is, a tenant holding over after his term has expired—his own title to recover would be gone also.

*Doe v.
Barnard.*

In the above cases the presumption of a fee is rebutted by showing some other interest in the possessor. It is also rebutted if it appears that the fee has, within the statutory period—formerly twenty years, now twelve—been vested in a third person. This proposition is illustrated by *Doe v. Barnard* (1849, 13 Q. B. 945), though, in that case, no notice seems to have been taken of the necessary qualification that, where evidence of such outstanding fee is given, the plaintiff may still show that the fee has become vested in himself by disseisin. The action was ejectment for a cottage in Essex. At the trial before Coltman, J., at the Essex Summer Assizes, 1848, it appeared from the evidence given for the lessor of the plaintiff that, in 1815, Robert Carter purchased the premises and was let into possession; but, the whole of the purchase-money not being paid till 1824, no conveyance was executed till that year. Robert Carter, immediately after the purchase in 1815, allowed his son John to occupy the premises rent free as tenant at will; and John continued so to occupy till 1834, when he died, leaving a widow, Mary Carter, the lessor of the plaintiff, and a son and other children. Mary Carter occupied from the time of her husband's death, until a short time before the present action. In 1829 the father, Robert Carter, mortgaged the premises for a term of years, and in 1845 the mortgage term was vested in Goody, who

attempted to recover possession under it in the action of *Doe v. Carter* (1847, 9 Q. B. 863). At the trial of this latter action in 1845, the verdict was for the defendant, and this was sustained on motion for a new trial, on the ground that the mortgagee's right was barred. Subsequently Barnard, who claimed under Goody, obtained possession—it does not appear how—and in the action of *Doe v. Barnard*, Mary Carter sought to recover possession from him.

To make out her title she relied on the Real Property Limitation Act, 1833. Her husband had been in possession for seventeen years, and she herself for thirteen. Presumably, therefore, the right of action which any person might formerly have had was barred, and his title extinguished. But the husband's possession, it was said, being short of twenty years, was not sufficient to vest the title in him, and, as he was not a disseisor, nothing descended to his heir. There being, therefore, no outstanding title, the effect of the statute, it was contended, was to protect the possession of Mary Carter against all the world, and so to vest the title in her. The Court, however, while admitting, on the authority of *Doe v. Dyball* (1829, Moo. & M. 346), and *Doe v. Martin* (1841, Car. & M. 32), that a possession short of twenty years was presumptive evidence of a seisin in fee, and that the wife could have recovered on her thirteen years' possession, had nothing further appeared, held that her title would be bad if an earlier seisin, not barred by the statute, was shown, and that the husband's possession for eighteen years, raised a presumption of such earlier seisin in him. "These cases," said Patteson, J., who delivered the judgment of the Court, "would have warranted us in saying that the lessor of the plaintiff had established her case, if she had shown nothing but her own possession for thirteen years. The ground,

however, of so saying would not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action; but that such possession is *primâ facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee. Here, however, the lessor of the plaintiff did more, for she proved the possession of her husband before her for eighteen years, which was *primâ facie* evidence of his seisin in fee; and, as he died in possession and left children, it was *primâ facie* evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail; and, therefore, she has by her own showing proved the title to be in another, of which the defendant is entitled to take advantage." Hence the plaintiff failed.

Objections
to *Doe v.*
Barnard.

It is an obvious objection to this judgment that the husband was only tenant at will, and the presumption of a fee arising upon his possession was clearly rebutted. It was noticed in *Groom v. Blake* (1857, 6 Ir. C. L. R. 400), that the Court did not actually determine that the heir of the husband could have recovered, and probably he could not. His father never had any estate of inheritance in the land. (But see *post*, p. 272.) The effect of the decision, it was said, was that the property was *quasi*-derelict, without a rightful owner, and that whoever could by any means smuggle himself into possession could maintain that possession against any person bringing ejectment; the principle was not one that ought to be extended. It is singular that the widow was not held to have gained the fee, either by disseisin immediately upon the death of her husband, or by the statute upon the lapse of twenty-one years from 1815, the date when her husband entered as tenant at will. There was no creation of a fresh tenancy at will in her favour, and her continuing in possession might have been regarded as a disseisin, with the result that a tortious seisin in fee was vested in her.

But assuming that, in 1834, there was no adverse claim by her such as to make her a disseisor, yet it seems clear that she must have become seised in 1836, when the title of the true owner was extinguished by the statute. It is opposed to the policy of the law to allow the fee to be vacant (cf. 2 Sm. L. C. 9th ed. 799), and if it is by the statute divested from the actual freeholder, it must be thereupon vested in the possessor for the time being (or, if time has run under sect. 9 of the Real Property Limitation Act, 1833, in the person in adverse receipt of rent). This remark applies only to a case like the present, where the statute runs against the true owner although he continues to be seised. Where he has been disseised, different considerations arise. The effect of the statute is then to extinguish his right of entry; it does not touch the estate in fee, which is already out of him. The point is of importance with reference to the title acquired under the statute in the case where there are successive possessors not claiming under each other, and will be considered again in that connection. (*Post*, p. 276.)

Nagle v. Shea (1874, 8 Ir. R. C. L. 224) has already *Nagle v. Shea.* been quoted as an authority that mere possession does not give a title upon which to recover in ejectment. The circumstances of the case may be conveniently stated here. The action was ejectment for a house which had formerly been held in fee by Thomas Shea the elder, who died about sixty years before the issue of the writ. His daughter, Catherine, married Thomas Shea the younger, and the two, after residing on the premises with the father during his life, continued in possession after his death. They had three sons, Patrick, John, and Henry, and three daughters. Thomas Shea, the younger, by his will devised the premises to his wife for life, remainder to his son Patrick for life, remainder, in events which did not happen, over. He died in 1846. His wife Catherine survived him;

his son Patrick had predeceased him. Catherine Shea remained in possession, and, in 1859, upon the marriage of her eldest daughter, Johanna, to the plaintiff, conveyed the premises to him in fee. The plaintiff and his wife resided on the premises with the widow till her death, in 1871, and shortly after that event Henry Shea forcibly ejected them. The plaintiff, in seeking to recover possession, denied the validity of the will of Thomas Shea, the younger, and claimed under the conveyance of 1859. But the will was upheld, and as the conveyance therefore had passed no more than a life estate, the title was shown to be out of the plaintiff.

The question thereupon arose, whether the plaintiff could recover on his mere possession, and the Court held, on the authority of *Doe v. Barnard* (1845, 13 Q. B. 945), that he could not. After referring to the passage from the judgment in the case quoted above (p. 117), Keogh, J., in whose judgment Morris and Lawson, JJ., concurred, said: "But here it was shown that the title was in another, and that the defendant, who had the possession, could rely upon it. Presumption of title arises from possession when unanswered, not otherwise. *Asher v. Whitlock* is distinguishable. There the devisee of a person in possession without other title was held entitled to recover, but only because the defendant, who had entered, could not show title in any other person prior to the devisor." This hardly seems correctly to represent the meaning of the Court in *Asher v. Whitlock*. It may not have been shown affirmatively that the title was then in the lord of the manor, but this, it is submitted, would have made no difference. It was shown that the devisor's possession was wrongful, and that he was a disseisor. Nevertheless his wrongful seisin gave a good title against all but the disseisee. Monahan, C.J., was inclined to give more weight to *Asher v. Whitlock*. "That case," he said,

“is a decision that, against a wrongdoer, mere possession is a sufficient title in ejectment.” But though entertaining a strong opinion that the judgment of the majority was wrong, he did not dissent from it. According to the old law the result was quite correct. The plaintiff failed to prove a title, and on his mere possession he could not recover. It would have been competent for him to show a title by disseisin, but the attempt, if it had been made, would probably have been unsuccessful. Taking under the tenant for life, he entered into possession rightfully, and his possession continued rightful during her life. Hence his wrongful continuance after her death made him, not a disseisor, but tenant at sufferance, and such tenancy was no title, even against a stranger.

This statement of the cases enables us to carry some-
 what further the summary which has been already given. Bare possession, subject to what is said hereafter, does not give a title upon which to recover in ejectment; seisin in fee, although tortious, does give a title, and any possession, however short, is evidence of seisin in fee. But it is only evidence, and the presumption of seisin in fee arising from possession may be rebutted, positively by showing some other interest in the possessor, or negatively by giving evidence of an outstanding fee, which has not been got in by conveyance or otherwise, or terminated by disseisin. Summary.

There remains the case where the plaintiff in ejectment does not set up a freehold title, whether evidenced by possession merely or otherwise, but claims as lessee under the existing freeholder. Must his title under the freeholder be perfect, or can he, in spite of some flaw in his title, nevertheless recover against a stranger? Before *Davison v. Gent* (1857, 1 H. & N. 744), it would probably have been said that he must prove his title strictly, but Title under freeholder.

that case was decided on the principle that, although an apparent lessee fails to prove his title, he can still recover on his bare possession.

*Davison
v. Gent.*

In 1842 the Dean and Chapter of Durham leased certain premises to Sherwood for twenty-one years. In 1849 they leased the same premises to Joseph Wood, also for twenty-one years. No actual surrender of the former lease was made, and it was doubtful whether there had been any surrender in law. Joseph Wood entered and died in possession, having devised his chattels real to his executors, Harrison and Elizabeth Wood, of whom Harrison disclaimed. In 1856, Elizabeth Wood took a renewed lease for twenty-one years, and sublet the premises to Davison. Davison was forcibly ejected by the defendant, who was a mere wrongdoer. Assuming that there had been no surrender of Sherwood's lease, it appears from the above facts that the strict title to possession was in Sherwood, and, Davison's title being thus defective, it was argued that he could not recover. But the Court held that, as against a mere wrongdoer, the plaintiff was not bound to strict proof of title, but could recover on his possession alone. "A plaintiff in ejectment," said Pollock, C. B., "is not deprived of his right to rely on his prior possession as against a mere wrongdoer, because he has brought forward documents which, if complete, might make out a perfect title, but which, on account of some defect in proof, do not establish his title to the property in question." And Bramwell, B.: "It is said that the plaintiffs have shown a title which is imperfect. If it appeared that the plaintiffs had been wrongfully in possession, it may be that they could not rely on mere possession as against the defendant. But it does not follow that the plaintiffs were wrongfully in possession, because they failed to show that they had a perfectly valid

title. Possibly, if Sherwood had been defendant, the plaintiffs might have had no title as against him. But that would not deprive them of their right to rely on their prior possession as against the defendant, who was a mere intruder."

The case of *Doe v. Barnard* (1849, 13 Q. B. 945), does not appear to have been discussed in *Davison v. Gent*, and it is difficult to reconcile it with the judgments just quoted. In *Doe v. Barnard*, ejectment was clearly distinguished from trespass on the ground that bare possession is not a title in ejectment, while it is a title in trespass. At the same time *Davison v. Gent* must be supported if possible. It is ridiculous to allow redress to a disseisor against a subsequent disseisor, and to refuse it to a lessee who has been evicted by a stranger because he has a flaw in his title. It might have been held that possession under an apparent title was sufficient for ejectment; but, though Lord Bramwell did refer to the meritorious nature of the plaintiff's possession, this was not the point on which the case was decided. In the absence of perfect title, the plaintiff was allowed to rest upon his mere possession. It is submitted that there is only one way to account for the introduction of this perfectly new principle. The legal consequences of possession have been changed both directly and indirectly by the Real Property Limitation Act, 1833. They have been changed directly, inasmuch as mere untitled possession is now sufficient to make the statute run against the owner. Formerly there must have been an adverse possession, and this practically meant an adverse seisin. But in changing the nature of an inchoate title under the statute, the Legislature have also changed the nature of the possession to which legal protection is afforded. As a matter of history, so far as concerns the recovery of possession, seisin is everything, bare possession nothing. In actual life

Suggested
extension
of the *jus*
possessionis.

seisin is no longer entitled to this pre-eminence. The right of possession, consequently, which the common law has always recognized, has, by the Real Property Limitation Act, 1833, been impliedly placed on a more extended basis. It rests now on mere possession, and not on seisin alone. This is the real principle which underlies *Davison v. Gent*. To say, as was there said, that a plaintiff is entitled to rely on possession as against a mere wrongdoer, is equivalent to giving him a right of possession against strangers, and this right of possession ranks, like the old right of possession, as a species of property. In other words, it is a possessory title which is capable of devise, and which, if not devised, will in general devolve upon the heir. But at this point there is a distinction. Under circumstances similar to those in *Davison v. Gent*—where, that is, possession has been taken by one who purports to be lessee—the new right of possession will be personal property, and will devolve accordingly. In brief, possession is now a good root of title, not only for the purpose of acquiring a perfect title under the statute, but also to confer upon the possessor a title to recover against strangers in ejectment.

Further
applica-
tion of
Asher v.
Whitlock.

In referring above to *Asher v. Whitlock* (1865, L. R. 1 Q. B. 1), we treated the case as an instance of the old right of possession, which arose on a disseisin in favour of the disseisor, and, to avoid quoting it too readily as an authority in support of the present suggestion, it seemed better, in the first instance, so to treat it. At the same time, while the judgment of Cockburn, C.J., was undoubtedly based on the law of disseisin, no attention was paid to the question whether disseisin had been found as a fact, and this circumstance shows a tendency to assume disseisin wherever there is a possession without title, whether it is strictly the possession of a disseisor or not. But if the view now

suggested is correct—if disseisin is no longer important, and dispossession has taken its place; if any possessor in favour of whom the statute is running has a right of possession, and is placed on as favourable a footing as the disseisor under the old law—it is permissible to make a further use of *Asher v. Whitlock*, and we may say that it applies the analogy of the old possessory actions to the new and more extended right of possession recognized by *Davison v. Gent*.

It is submitted, then, that since 1833 possession has acquired a new significance. It is still *prima facie* evidence of seisin in fee, and, where the evidence is not rebutted, the seisin in fee may be relied on as a title. But this is no longer its only importance. It is itself the source of a right of possession which, while the possession lasts, is protected in trespass, and which, after possession has been lost, is a title against strangers in ejectment. The procedure in ejectment has been in modern times changed, and the action itself has been replaced by the action to recover possession of land; but these changes have not affected its nature, and it is unnecessary further to refer to them.

Possession
a source
of title.

Formerly it was necessary that the plaintiff in ejectment should show a legal title, and if, by proof that the legal title was outstanding, it appeared that the plaintiff's title was equitable only, he failed. The law was settled on this footing in spite of Lord Mansfield's efforts to secure recognition for equitable owners (*Doe v. Wroot*, 1804, 5 East, p. 138; *Doe v. Reade*, 1799, 8 T. R. p. 122; Roscoe's Real Actions, II. 490; Lewin on Trusts, 9th edit. 761); but the severity of the rule was mitigated by allowing a conveyance of the legal estate to be presumed, although twenty years had not elapsed from the time when such conveyance should have been made by the trustee. (*England v. Slade*, 1792, 4 T. R. 682.) It is possible, however,

Legal title
formerly
required.

that at the present time a *cestui que trust* who is entitled to possession of land could recover possession on his equitable title alone. (Judicature Act, 1873, s. 25 (11); *Walsh v. Lonsdale*, 21 Ch. D. 9.)

Estoppel. The above authorities are concerned with the case of unlawful entry. In the case where the defendant has entered for a limited estate under the plaintiff or his predecessor in title, the plaintiff is assisted in recovering possession on the termination of the estate by the doctrine of estoppel. Where the limited estate is created by deed, the estoppel arises on the deed, and, since all legal estates, except tenancies not exceeding three years, must now be created by deed, the estoppel is usually of this nature. But in the absence of a deed the estoppel arises by acceptance of the estate. In modern times the doctrine is most frequently applied to the relation of landlord and tenant. The tenant is estopped from disputing his landlord's title (*Doe v. Lady Smythe*, 1815, 4 M. & S. 347), or rather, from denying that his landlord had title at the time of granting the lease, for he may show that it has since terminated. (*Alchorne v. Gomm*, 1824, 2 Bing. p. 60; *Downe v. Cooper*, 1841, 1 Gale & Day. 573; *Pope v. Biggs*, 1829, 9 B. & C. p. 251; *Doe v. Barton*, 1840, 11 A. & E. 307; 2 Sm. L. C. 9th edit. 913.) But the doctrine extends to all cases where possession has been obtained by consent. "The rule as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission, as a mere lodger, or as a servant." (Per Patteson, J., in *Doe v. Baytup*, 1835, 3 A. & E. 188.) And the defendant is as much estopped from setting up title in himself as in setting up a *jus tertii*. "When," said Lord Redesdale, in *Saunders v. Lord Annesley* (1804, 2 Sch. & Lef. p. 103), "possession is gained under a contract by a

person having a right, he can only have it such as the person has it from whom he obtains the possession ; and is bound to accept the possession according to that right." (Cf. per Lord Wensleydale in *Archbold v. Scully*, 1861, 9 H. L. C. p. 380 ; *Att.-Gen. v. Lord Hotham*, 1823, Turn. & Russ. p. 219 ; *Beere v. Fleming*, 1864, 11 L. T. R. p. 52 ; *Lord Courtown v. Ward*, 1802, 1 Sch. & Lef. 8.) Under the old law the estoppel did not arise where the defendant at the time of accepting the estate had right of entry (*ante*, p. 100) ; in other words, the estoppel by mere acceptance of the estate was cured by remitter, though remitter was not allowed if the estoppel arose by deed or by matter of record. (Litt. s. 693.) At the present time the doctrine of remitter seems to be obsolete, and probably the estoppel operates in all cases.

CHAPTER VII.

RESTRAINT ON EXERCISE OF RIGHT OF ENTRY.

Prohibition of forcible entry.

A PERSON who is entitled to the possession of land may enter upon it, and take possession for himself, but this right is subject to the restriction that the entry must not be accompanied by the use of force. The restriction must be considered from two points of view:—the prohibition of forcible entry by the criminal law, and the effect of this prohibition in civil actions.

1. THE STATUTES OF FORCIBLE ENTRY.

Statutes of Forcible Entry.

The use of excessive violence in exercising a right of entry seems to have constituted an offence indictable at common law (Hawk. P. C. Vol. I. 495; *The King v. Wilson*, 1799, 8 T. R. p. 360); but it has been from early times expressly made punishable by the series of statutes known as the Statutes of Forcible Entry.

5 Ric. 2, c. 7.

The first of these, 5 Ric. 2, c. 7, provided that no entry should be made into lands or tenements, except where entry was given by law; and in that case, not with a strong hand, nor with multitude of people, but only in peaceable and easy manner. (Pollock on Torts, 3rd ed. 336.) Offenders were to be imprisoned, and ransomed at the king's will.

15 Ric. 2, c. 2.

The next statute, 15 Ric. 2, c. 2, empowered the justices to interfere. Upon complaint of a forcible entry they

were to take sufficient power of the county and repair to the place where the force was made; and if any held the place forcibly after entry made, they were to be taken and put into the next gaol, there to abide, convict by the record of the justices, until they had made fine and ransom to the King. The statute 8 Hen. 6, c. 9, provided that the earlier statutes should apply both to forcible entry and to forcible detainer; and enacted that the justices might cause the land to be re-seised, and the party put out to be put back into possession. In addition he was to have his assize of novel disseisin, or writ of trespass, and if the forcible entry or forcible detainer was found, he was to recover treble damages. It was provided, however, that there was to be no forcible detainer within the statute, where the detainer or his predecessor in title had been in possession for three years; a proviso which was further enforced and explained by 31 Eliz. c. 11.

8 Hen. 6,
c. 9.

31 Eliz. c.
11.
Forcible
entry.

Thus the statutes recognize two offences, forcible entry and forcible detainer; and in addition to punishing the offender, they provide for the summary restitution of possession to the person aggrieved. The force which will constitute a forcible entry may take the form of actual violence to the person of the possessor, or it may consist in the use of such threats or display of force as to give just cause to fear bodily hurt. (Hawk. P. C. I. 501.) Forcible entry is "entry with a strong hand, with unusual weapons, or with menace of life or limb." (Bac. Abr. 7th ed. III., tit. Forcible Entry, 716.) And, in pleading, the allegation that the entry is *manu forti* is said to be necessary to show that the force is unlawful; *vi et armis* implying no more than the slight violence which a man may lawfully use. (*Harvey v. Brydges*, 1845, 14 M. & W. 437.) So, too, in the case of entry into a house, the law is broken if violence be done to the building, and it is said to be forcible to break

open the house, though not to draw a latch and so to enter. (Bac. Abr. III., tit. Forceible Entry, 717; Hawk. P. C. I., 501.) The entry, moreover, is equally forceible whether there is actual force on entering, or whether, after a stranger has entered upon the land, he turns out the possessor by force or frightens him out by threats. "If one enters peaceably, and, when he is come in, useth violence, this is a forceible entry." (Vin. Abr. 2nd ed. XIII. 380.) "If a man enters peaceably into a house, but turns the party out of possession by force, or by threats frights him out of possession, this is a forceible entry." (Bac. Abr. III. 716.)

*Edwick v.
Hawkes.*

The law as thus stated was acted upon by Fry, J., in *Edwick v. Hawkes* (1881, 18 Ch. D. 199). There the defendants had taken possession of a public-house under a right of entry. The evidence showed that on the 4th of October, 1880, their foreman went to the house accompanied by two men, and also by one of the county police, who went at the request of the defendants, and who warned the plaintiff, the tenant of the house, not to interfere with the defendants' men. The defendants' men entered peaceably, and they took possession of the bar and turned the plaintiff out of the house, but his wife and family were allowed to remain. The plaintiff returned on the 5th and 6th of October, and was on each occasion put out again by the defendants' men. On the last occasion his wife also was forcibly turned out, being carried out of the house by three of the defendants' men, and there was medical evidence that she had suffered serious injuries. On this state of facts Fry, J., held that the defendants had been guilty of a forceible entry. After pointing out that the statute of Richard II. prohibits an entry with a strong hand, and that possession can only be taken in a peaceable and easy manner, he continued: "If the operation of the statute is confined to the mere act

of getting over the border, the edge, of the property in question peaceably, the statute is evidently not adequate to meet the evil which it was intended to repress, viz., the evil of persons who have a right, as well as those who have not a right, causing disturbance, inaugurating civil war, for the purpose of obtaining possession of that which is or which they claim to be their property. Accordingly, it appears to me to be clear law, and I desire to restate it, that, if an entry be made peaceably, and if, after entry made, and before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the statute of Richard II."

The statutes of Richard II. punish all force, without regard to the estate of him upon whom the entry is made, therein differing from 8 Hen. 6, c. 9, which deals with restitution of possession. At the same time the person entered upon must have some estate, as of freehold or as lessee for years, sufficient to confer exclusive possession; and there can, therefore, be no forcible entry within the statutes on a bare custodian (Bac. Abr. III., tit. Forcible Entry, 719), or, it has been held, upon a tenant at will, or at sufferance. (*The King v. Westly and Walker*, 1670, 2 Keble, 495; cf. *The King v. Dorny*, 1 Salk. 260.) But such tenants have an exclusive possession in respect of which they can maintain trespass, and as to them the rule may be doubted. (Cf. Hawk. P. C. I. 503.)

Person entered upon must have exclusive possession.

Moreover, if a person, having right of entry, enters upon land, he will obtain the possession for civil purposes, and will obtain also a possession in respect of which he can bring an indictment under the statute, although the actual possession may still be in dispute. This, as stated above (p. 38), seems to account most satisfactorily for the decision in *Lous v. Telford* (1876, 1 App. Cas. 414), where Lord

Lous v. Telford.

Selborne, citing *Jones v. Chapman* (1847, 2 Ex. p. 821), pointed out that, whether Lows had obtained actual possession or not, he had, since he entered with title, obtained the possession for civil purposes; and hence there was a sufficient foundation for the charge of forcible entry against Westray and Telford.

Forcible
detrainer.

The statute 15 Ric. 2, c. 2, only recognized the offence of forcible detrainer when it had been preceded by a forcible entry; but 8 Hen. 6, c. 9, made it a distinct offence, and under that statute a forcible detrainer of land, though after a peaceable entry, was made criminal. As to what amounts to a forcible detrainer, it is said that the same circumstances of violence or terror which will make an entry forcible will make a detrainer forcible also. (Hawk. P. C. I. 502.) The strict words of the statute appear to imply that a detention of land even by the owner, who has entered under his right of entry, may be forcible, but the Courts have shrunk from giving them such an effect. "I cannot think," said Denman, C. J., in *The King v. Oakley* (1832, 4 B. & Ad. 307), "that the legislature meant that the act of a man in maintaining his own rightful possession with force against a wrong-doer should authorize the justices to turn him out of possession." And so it is said elsewhere:—"If a man be gotten peaceably into his own, it seems he may defend it by force." (Bac. Abr. III. 718.) Consequently it is only a forcible detrainer where a person who has entered, whether forcibly or not, without right, or who, having right, has entered forcibly, withholds the possession from the former possessor.

Effect of
three
years' pos-
session.

The offence of forcible detrainer does not appear at the present time to be of any practical importance, but it may be noticed that the old writers were a good deal exercised over the provision of 8 Hen. 6, c. 9, and 31 Eliz. c. 11, allowing a three years' peaceable possession to justify a

forcible detainer. For this purpose, it was said, the possession must have been in respect of a lawful estate, or at least the proviso applied only to a detainer after a peaceable entry. (Hawk. P. C. I. 510.) But the statutes seem to save a three years' possession from the penalties attached to forcible detainer in all cases. As against disseisees with right of entry this was no hardship, since by making claim they could at once vest the possession in themselves, and it was considered that there was thereupon a fresh entry and detainer by the disseisor (Hawk. P. C. I. 503); and as against strangers, the disseisee's possession was good. "Bare possession is a good title against all persons, except him who hath the right, and cannot be lawfully defeated by any other." (Hawk. P. C. I. 510; *Asher v. Whitlock*, 1865, L. R. 1 Q. B. 1.)

The power of the justices to restore possession to the person forcibly ejected depends, under 8 Hen. 6, c. 9, on the effect of the word "re-seize," and hence the statute was held to apply only to cases where entry had been made on a freeholder. To cure this defect the statute 21 Jac. 1, c. 15, was passed, which gave the justices a similar power of restitution in favour of tenants for years, tenants by copy of court roll, and others. Hence in indictments it became necessary to show the estate of the aggrieved party, that it might be known which statute was to be relied upon (*The King v. Arden*, 1616, 3 Bulst. 71); and it is sometimes said, though not, it would seem, with strict accuracy, that the statutes of Ric. 2, and 8 Hen. 6, c. 9, extend only to freeholds, and 21 Jac. 1, c. 15, to lessees for years, &c. (*Rex v. Wannop*, 1754, Sayer, 142.)

Restitu-
tion of pos-
session.

2. THE EFFECT OF THE STATUTES ON THE CIVIL RIGHT OF ENTRY.

Two questions.

It remains to consider the effect of the prohibition of forcible entry on the right of entry itself, and on the possession which is obtained under it. This raises two questions: First, can the person forcibly ejected complain in a civil action that the entry was unlawful, and so either recover possession, or obtain damages for the dispossession? Secondly, can the person entering maintain that his entry puts him in lawful possession for all civil purposes, so as to justify him in treating other persons on the land as trespassers, and in removing themselves and their goods by force?

Right of entry is not affected.

To the first question the answer is clear. The statutory prohibition of the use of force does not in any way affect the civil right of entry so far as the mere entry and taking possession of the land is concerned. There is not at the present day any action merely possessory in which a person forcibly ejected can recover possession as against the owner, and as the person ejected cannot under such circumstances recover possession, neither can he recover damages for the dispossession. This was recognized even in actions of forcible entry grounded on the statutes, and if in such an action the defendant succeeded in proving title in himself, he was dismissed without any inquiry concerning the force. (Hawk. P. C. I. 495). "For howsoever," it is said, "he may be punishable at the king's suit, for doing what is prohibited by statute, as a contemner of the laws and disturber of the peace, yet he shall not be liable to pay any damages to the plaintiff, whose injustice gave him the provocation in that manner to right himself."

Modern cases.

Moreover, that the mere civil right of entry is not interfered with by the statutes is recognized in numerous

modern cases. In *Taunton v. Costar* (1797, 7 T. R. 431) it was held that a tenant holding over could not treat the entry of his landlord as a trespass. "If, indeed," said Lord Kenyon, C. J., "the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term." And in *Turner v. Meymott* (1823, 1 Bing. 158), where the tenant's term had expired, and in his absence the landlord broke open the door and resumed possession, a new trial was granted upon the tenant obtaining a verdict in trespass. "If the landlord," said Dallas, C. J., "has used force, that is an offence of itself, but an offence against the public for which, if he has done wrong, he may be indicted." Upon the same principle it was held in *Burling v. Read* (1850, 11 Q. B. 904) that the defendant, with right of entry, might justify entering and pulling down a workshop, although the plaintiff was in it at the time. So, in *Pollen v. Brewer* (1859, 7 C. B. N. S. 371), it was treated as clear that for the mere expulsion no damages could be recovered, and this has been recently laid down both in England and in Ireland. In *Beddall v. Maitland* (1881, 17 Ch. D. 174), Fry, J., said (p. 188): "The plaintiff can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Ric. 2 creates a crime, it gives no civil remedy." And in *Beattie v. Mair* (1882, 10 L. R. Ir. 208), Pallett, C. B., said (p. 211): "I think it clear upon principle and authority that a civil action cannot be maintained against the true owner by one wrongfully in possession, merely for expelling him by force and with a strong hand from his unlawful possession."

But although the forcible exercise of a right of entry Whether
possession

under
forcible
entry is
"lawful"
for all civil
purposes.

does not expose the person so entering to liability in a civil action either to restore possession or to pay damages, the Courts have been reluctant to allow that a possession so gained is for all civil purposes lawful; and it is, perhaps, the prevalent opinion that it cannot be used to justify injury done in the course of the entry either to the persons or to the goods of those who are wrongfully upon the land. In *Hillary v. Gay* (1833, 6 Car. & P. 284), a landlord turned the tenant's wife into the street and put his furniture out of the window; and Lord Lyndhurst held that he could not justify this under his right of entry. "If," he said in summing up, "the defendant had a right to the possession, he should have obtained the possession by legal means." On the other hand, if the civil right of entry is not affected by the statutory prohibition of forcible entry, it may be argued that the possession gained under it must be for all civil purposes a lawful possession, and this opinion was strongly entertained by some of the judges before whom at different times came the case of *Newton v. Harland* (1840, 1 Man. & Gr. 644), which is the leading authority on the subject.

Newton v.
Harland.

The plaintiffs, Mr. and Mrs. Newton, sued in trespass, alleging that the defendants, on the 2nd of March, 1837, with force and arms assaulted the plaintiff, Mrs. Newton, and put her out of a dwelling-house into the road. The defendants pleaded first, not guilty; secondly, that the defendant Harland was lawfully possessed of the dwelling-house, that Mrs. Newton was unlawfully in it, and that he put her out with slight force, doing no unnecessary damage. The first trial took place before Parke, B., at the York Assizes, in 1837. From the facts which were proved then, and at the subsequent trials, it appeared that Newton hired rooms of Harland for a term of six months, which expired on the 1st of March, 1837. On the follow-

ing day Harland demanded possession, but Mrs. Newton refused to leave. Thereupon he employed a blacksmith to pick the lock, and, having entered the rooms with four or five persons, compelled Mrs. Newton, her children and servants, to go. Parke, B., holding that Harland had gained a lawful possession, told the jury that the second plea was made out, and a verdict was given for the defendants. A new trial was granted on the ground of misdirection, Tindal, C.J., saying :—"I do not see how the defendants can justify the expulsion of the female plaintiff under a possession obtained by an act which in itself is criminal"; and Park and Bosanquet, JJ., concurred, Coltman, J., expressing no opinion on this point. The second trial took place at York, before Alderson, B., in 1838, but he adopted the same view of the law as Parke, B., and with the same result. He directed the jury that, where a tenant holds over, the landlord is entitled to turn him out, using no unnecessary violence; and that the question on the second issue was whether the term had expired and Mrs. Newton had refused to go.

In Easter term, 1840, a new trial was again ordered, the point being now more carefully considered by a Court consisting of Tindal, C.J., and Bosanquet, Coltman, and Erskine, JJ. The majority (Coltman, J., *diss.*) held that the defendant could not plead that he was "lawfully in possession," if his entry was forcible, and inasmuch as the jury had not yet had the question, whether the entry was forcible, submitted to them, a third trial was necessary. "If," said Tindal, C.J., "the landlord, in making his entry upon the tenant, has been guilty either of a breach of a positive statute, or of an offence against the common law, it appears to me that such violation of the law in making the entry causes the possession thereby obtained to be illegal; and that the allegation in the plea that one of the

defendants was *lawfully in possession* at the time the assault was committed is negatived." So Bosanquet, J.:—"If the act be expressly prohibited by statute, it must, I apprehend, be illegal and void." And Erskine, J., while admitting that the tenant had no remedy in trespass, held that damages could be given for personal injury. Coltman, J., on the other hand, maintained that the possession, if lawful at all, was, for the purpose of a civil action, lawful altogether:—"For the preservation of the peace, the law will punish for the forcible entry; but the tenant at sufferance, being himself a wrongdoer, ought not to be heard to complain in a civil action for that which is the result of his own misconduct and injustice. . . . I am of opinion that, although the defendant, if guilty of a forcible entry, is responsible for it in the way of a criminal prosecution, yet that, as against the plaintiffs, who are wrongdoers and altogether without title, he has obtained by his entry a lawful possession, and may justify in a civil action the removing them in like manner as in the case of any other trespasser." At the third trial, which took place at York in 1840, before Coltman, J., the jury found that there had been a forcible entry, and the plaintiffs had a verdict for forty shillings.

*Harvey v
Brydges.*

It thus appears that in *Newton v. Harland* a remarkable difference of opinion was revealed as to the effect for civil purposes of a possession forcibly taken under a right of entry. It is agreed that the mere right of entry is not affected by the Statutes of Forcible Entry, and accordingly the owner who has thus entered cannot be compelled in a civil action, either to restore possession to the person ejected, or to compensate him in damages for the loss of the possession. The divergence arises when we attempt to make the deduction that the possession thus securely obtained—impregnable against civil remedies—is a posses-

sion to be treated in all civil actions as lawful. This view, acted upon by Alderson, B., and Parke, B., at the assizes, and maintained by Coltman, J., against Tindal, C.J., and Bosanquet and Erskine, JJ., on the second application for a new trial, was strongly re-asserted by the first two judges in *Harvey v. Brydges* (1845, 14 M. & W. 437). "I have still," said Alderson, B., "the misfortune to retain the opinion that I expressed in *Newton v. Harland*, although the majority of the Court of Common Pleas have held the contrary." And Parke, B., stated the law as follows:—"The next point was that raised in *Newton v. Harland*; and, if it were necessary to decide it, I should have no difficulty in saying that, where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for the forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed." This was adopted in *Blades v. Higgs* (1861, 10 C. B. N. S. 713), and appears to have been approved of by Lord Selborne in *Lows v. Telford* (1876, 1 App. Cas. p. 426), where he said:—"And in *Harvey v. Brydges* it is pointed out that, so far as relates to the fact of possession and its legal consequences, it makes no difference whether it has been taken by the legal owner forcibly or not." As to this *dictum*, however, it is to be noticed that the point decided in *Newton v. Harland* was not then under consideration, and it was sufficient for Lord Selborne's purpose that the owner obtained a possession protected both

by civil remedies and the Statutes of Forcible Entry against subsequent aggression, without going further and holding that his possession justified him in becoming an assailant and inflicting injury upon other persons, although, after his entry, they were to be regarded as trespassers.

Cases following
Newton v.
Harland.

On the other hand the decision of the majority of the Court of Common Pleas in *Newton v. Harland* has been several times followed. In *Pollen v. Brewer* (1859, 7 C. B. N. S. 371) the plaintiff was in possession of premises, and refused to quit. The defendant, under a right of entry, entered and forcibly expelled him and his family. A distinction was taken between the entry itself and the assault committed in the course of it, and the plaintiff was held to be entitled to damages for the assault, though not for the ejectment. And in the two cases of *Beddall v. Maitland* (1881, 17 Ch. D. 174) and *Edwick v. Hawkes* (1881, 18 Ch. D. 199), Fry, J., emphatically expressed the same opinion. In the former case, after saying in the passage quoted above (p. 135) that no damages could be recovered either for the entry or for the force used in the entry, he continued:—"But in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry, and he cannot plead that he has a lawful possession." Consequently he held that, while a person who had been forcibly evicted by the owner could not recover damages for the forcible entry and eviction, yet he could for injury done to his furniture. So in *Edwick v. Hawkes* he held that damages could be given for an independent wrong done to the plaintiff's wife in the course of a forcible entry on the plaintiff, though not for the forcible entry itself; and further that a licence to enter and eject the tenant, and for that purpose to use

all necessary force, was void as an authority to commit an offence punishable criminally under the statutes of Richard II.

But the doctrine of these cases, that damages may be given for injury done in the course of an entry under title, rests altogether on the hypothesis that the entry is in fact forcible. If the owner enters peaceably, and then, in the exercise of his rights as owner, does acts which cause injury to property unlawfully left upon the premises—this injury gives no cause of action. In *Jones v. Foley* (1891, 1 Q. B. 730), the plaintiff was tenant of a cottage, and on the expiration of his tenancy wrongfully refused to give up possession to the defendant. The latter, being desirous of rebuilding the cottage, sent workmen to remove the roof. In the course of the removal, which was effected without any personal violence, some tiles and other portions of the roof unavoidably fell on the plaintiff's furniture in the room below, and damaged it. It was held that, since there had been no forcible entry, there was no room for the application of the doctrine recognized in *Beddall v. Maitland*.

Upon consideration of the whole matter it would seem that the view taken by the majority of the Court of Common Pleas in *Newton v. Harland* is correct. It is true that the prohibition of forcible entry under the statutes does not interfere with the civil right of entry, and, even although this is exercised forcibly, yet in a civil action neither can damages be given nor possession restored. But this is perfectly intelligible. No damages are given because no right of the possessor has been violated. His possession gives him a right as against strangers, but it gives him none against the owner. The law affords no action merely possessory, such as the interdiction *unde vi* of the Roman law, and the prohibition of

Forcible entry by owner gives no cause of action.

violence by the statutes does not have the effect of supplying the omission. In the Roman law the prohibition of violence may have been influential in abolishing the *exceptiones vitiosæ possessionis* in the *unde vi*, that is, in taking away right of entry: it does not so operate in English law. The possessor without title who has been forcibly ejected can, if he chooses, go to the justices for restitution under the statute; but the civil law, finding the owner actually in possession, leaves him there in spite of his forcible entry, and does not, by removing him, drive him to his action of ejectment. To do so would simply prolong the dispute.

But possession under forcible entry is no justification for independent wrong.

But while the civil law does not, merely in furtherance of the policy of the criminal law, introduce a new action for recovering possession against the true owner, there appears to be no good reason why it should refuse altogether to recognize the statutory prohibition of violence. It is perhaps simpler to hold, with the dissentient judges in *Newton v. Harland*, that, since the right of entry is not affected by the statutes, a possession taken under it is lawful for all purposes; at the same time, so soon as the distinction is pointed out between the entry itself and independent wrongs committed in the course of the entry, it commends itself as reasonable. The wrongful possessor has no remedy in respect of the exercise of the right of entry, because he has no civil right of possession—at least, as against the owner—and the statutes do not confer such right upon him. But when he complains of the assault on himself, or the damage to his goods, he complains of a violation of his admitted rights, and all that the law does is to prevent his assailant from pleading lawful possession by way of justification. The civil law does not carry its deference to the criminal law so far as to institute in favour of a possessor forcibly evicted by the owner a

new form of action ; but it is not inconsistent with this that the civil law should so far defer to and assist the criminal law as to prevent the owner from setting up in defence a possession gained in defiance of the criminal law. The distinction is clear and useful, and appears to be perfectly justifiable, notwithstanding that it dates no further back than *Newton v. Harland*, and even there, perhaps, was not very clearly perceived. (Cf. Pollock on Torts, 3rd ed. p. 338.)

CHAPTER VIII.

REASONS FOR THE PROTECTION OF POSSESSION.

Reasons
for the pro-
tection of
possession.

THE foregoing account of the remedies for the protection of possession—for its maintenance and recovery—may be concluded with some observations on the grounds upon which this protection has been justified. The various theories of the civilians on the subject have been briefly sketched by Mr. Justice Holmes (Common Law, p. 206), and they are more systematically described by Ihering (Grund des Besitzes-Schutzes, pp. 3—45). It will be sufficient to refer to three—the “will” theory, and the theories advanced by Savigny and by Ihering himself.

The
“will”
theory.

According to the first, possession is to be regarded as the embodiment of the will of the possessor, and in the interest of the freedom of the will, or, as it is also put, to secure equality, the will of the individual must be protected until overruled by the will of the community regularly asserted through a court of law. The most obvious defect of the theory, considered as based on the Roman law, is that it is opposed to the practical working of that system. That a particular person is in possession—that he has willed to possess—is no guarantee that his possession will be protected. He may be a bailee or lessee, and then protection is altogether denied him; or he may have acquired possession “*vi clam precario*,” and then he is not, in earlier times at least, protected against the entry of the person he has wronged.

Savigny assigns more practical reasons. The interdict *unde vi* is given to redress the violence involved in the forcible dispossession (Poss. p. 6); the interdict *de precario* to redress the abuse by the tenant of the confidence of his landlord. Wholly to efface the injury, there must be a restoration of the party wronged to his original position (*ibid.*, p. 28), and hence the creation of a *jus possessionis*. But this is a consequence merely. The *jus possessionis* does not exist as an independent right, so as to obtain legal recognition for its own sake (*ibid.*, p. 23). It is not, therefore, in Savigny's opinion, a right which can descend to an heir, and in virtue of which he can recover the possession held by his ancestor. This appears from his treatment of the case of abatement.

Ihering regards the protection of possession as designed solely in the interest of owners. Possession is apparent ownership, and in the great majority of cases the possessor is the owner. To allow the possessor, then, to succeed on his mere possession is, in general, to give the owner a remedy in which he is saved from the burden of proving title; and if occasionally the possessor is not the owner, and prevails against the owner, this is a disadvantage which is said to be outweighed by the advantages of the system. To support the theory, Ihering strove to find in the Roman law an extension of possessory remedies, suitable for all the requirements of owners. The burden of proof of title is as severe to the heir who seeks to recover land of which his ancestor died possessed, as to an owner who has been himself in possession. Hence, as already stated, Ihering finds a possessory remedy for the case of abatement, and he argues that in later times such remedies were used for other cases of loss of possession than forcible dispossession. (Grund des Besitzes-Schutzes, pp. 102—112; L. Q. R., III. 46; *contra*, Savigny, Poss. p. 360.)

It has been doubted, however, whether, in the majority of cases of disturbance of possession, the possessor is, in fact the owner—in other words, whether the title of disseisors is generally worse than that of disseisees. (Holmes, Common Law, p. 208.) And whatever may be the truth on this point (cf. Mr. Bond's article in L. Q. R., VI. 263), it does not seem that the interest of owners really requires a system of possessory remedies. It is sufficient if procedure is simplified and possession made *prima facie* evidence of title. The history of the English law, in which possessory remedies were in fact extended to meet all the requirements of ownership, shows that possessory procedure may be an important means to this simplification, but there is, so far as owners are concerned, no reason for perpetuating such procedure, and leaving them liable to forfeit possession to a stranger.

Possession
a source of
title.

There is another view of the protection of possession which is more in accordance with the principles of English law. Possession is the source of a right which may be described as a qualified right of property. In the absence of the true owner, the possessor, at any rate if he is seised, ranks as owner. He has, therefore, as against strangers, the proprietary remedies of an owner. The original reason for this is to be sought in the peculiarities of feudal tenure. The tenant who was for the time being discharging the burdens of the estate was properly regarded as owner *de facto*, and his own rights, and the rights of those claiming under him, were regulated upon this basis. And the continuance of such a system is easily justified upon grounds of convenience. Even where the possession has had no meritorious commencement, it is better to protect the possessor than to leave him open to the attack of strangers. The law indeed does no more than he will probably do for himself with danger to the public peace. (Cf. Holmes,

Common Law, p. 213.) While if possession has been taken in good faith, but under a title which turns out to be defective, the possessor clearly deserves full protection against strangers.

The above considerations make it an easy matter to assign to possessory real actions their proper place in the history of English law. In dealing with these actions the question is not why possession is protected at all, but why, when in the form of seisin in fee it is already protected against strangers, special remedies for its protection are introduced. The answer is that they were a means of simplifying procedure. In a writ of right the claimant relied on his title as derived from the seisin in fee under which he claimed. But this was a matter of mere right, to be decided after infinite delay by battle or the great assize. In a possessory action he alleged a wrong to his actual seisin or to his possessory right, and this with less delay could be referred to a jury. "The battle," says Chief Baron Gilbert (*Tenures*, p. 47), "was in the writ of right where the property was doubtful, but in matters of plain and obvious right, as were those of possession, they did not appeal to Providence." The simplification of procedure was carried still further by the action of ejectment, which, as already shown, ranked as a possessory action. So far as the freehold title was concerned, the action depended on right of entry, and this meant that there had been a wrong to the *jus possessionis*, in respect of which a possessory real action might ordinarily have been brought.

Position of
possessory
procedure
in English
law.

But down to 1833 possessory actions had another result than the simplification of procedure. They created a distinction between the right of property and the right of possession, and made it possible for the latter to prevail over the former. Why was the question of the real title—of mere right—so long excluded? In other words, why was the

Abolition
of real
actions.

true owner's right of entry liable to be tolled? For the two questions are identical. If there is no right of possession complete against the owner, the real title must prevail, whether the action is in form proprietary or possessory. Originally the question of mere right may have been excluded in imitation of the Roman law. The possessory action was on the possession merely, and did not admit matters of title. But when such actions came to be, not on the possession merely, but on the right of possession, which was analogous to the right of property, and when matters affecting the title under the right of possession—such as feoffments and descents—were freely pleaded, this reason did not hold. Consequently, after the right of entry had been gradually extended, and when the extension was checked by the final adoption of the doctrine of descent cast, no one thought of justifying this state of the law on the ground of any difficulty in discovering in a possessory action on which side the real title lay. The matter was looked at from another point of view, and the heir of the disseisor was regarded as having a possession which actually deserved protection even against the true owner. He had had the freehold cast upon him by act of law, and he was protected in the possession of the freehold until the true owner obtained a judgment against him. (Co. Litt. 237 b; Blackst. Bk. III. Ch. 10; Gilbert's Tenures, 21.) But this and the other reasons assigned were, as Prof. Maitland has pointed out (L. Q. R. Vol. IV. 298), mere fictions. The doctrine of descent cast simply marked a stage in the development of the law, and the natural course of the development was resumed and completed in 1833, when the doctrine was abolished. Thereupon it would have become possible for the owner to raise, even in a possessory action, any question of title; and proprietary and possessory actions would

have differed only in the manner in which the cause of action was stated and in the mode of trial. But, at the same time, both forms of action were replaced by the one action of ejectment. Under the Roman law special possessory actions could not have been abolished without at the same time leaving the possessor who was without title open to the attack of strangers. The interdicts not only gave the owner a ready means of recovering possession, but also protected in certain events the untitled possessor. In the English law the untitled possessor (at any rate, if he claims to be freeholder) is not dependent upon possessory actions. Save as against the true owner, he ranks as owner; and as against the true owner, too, he is protected by the Statutes of Forcible Entry.

In regard to the maintenance of possession, the protection afforded by English law was formerly, and perhaps is still, wider than in regard to the recovery of possession, and any possessor may bring trespass. This has been said to be an extension of the protection which the law throws around the person (per Denman, C.J., in *Rogers v. Spence*, 1844, 13 M. & W. 571)—a theory similar to that of Savigny. But probably there is no sound reason for the distinction which formerly prevailed between trespass and ejectment, and at the present time mere possession seems to be the foundation of a *jus possessionis*, which is protected both in trespass and in ejectment. This is simply an extension to possession generally of the protection which was formerly accorded to seisin only. (*Ante*, p. 123.)

Modern
right of
possession.

The whole of what has been said as to the protection of possession may be summarized as follows: In the Roman law possession is clearly distinguished from ownership. Ordinarily a claimant to land must rely on his title as owner, and if he fails to prove this he fails in his claim, whoever his opponent may be. But an easier remedy is

Summary:
Roman
law.

given by the interdicts for the two specific cases of dis-possession and withholding by a tenant at will. These interdicts avail for the owner who has been in possession; they also avail for the mere possessor; and, since it is essential to the interdicts that the question of ownership should be excluded, the possessor may succeed against the owner. The result of giving any protection at all to possession is to create what may be called a right of possession. But the protection being thus limited, the right of possession does not rank as a right of property.

English
law.

In English law we must first take possession in the form of seisin. There is no marked distinction between ownership and seisin. Seisin is the source of a right of property which is always valid as against persons with an inferior right. It may be defeasible because someone else has a better right, but as against strangers at any rate it is good. We start then with a right of property based on seisin, which varies only according as it is absolute or defeasible. In consequence, however, of the peculiarities of the writ of right, this right of property was difficult to try. The difficulty was removed by the artifice of treating seisin as the source of a right of possession merely. The wrongs to the possession—more strictly the wrongs to the right of possession—were treated as questions of fact, and as such they admitted of easy trial. The list of wrongs is given by the names of the assizes and the writs of entry. It is not restricted to one or two specific infringements. It includes nearly all the cases for which an owner would want redress. But at the same time that possessory actions were introduced, the question of title was to a certain extent excluded—at first rigorously, then only in certain events. The right of possession might be separated from the right of property, and the true owner who had entered after he had lost his right of possession would find himself

defeated in a possessory action. While, however, this may have contributed in the first instance to the simplicity and speed of possessory procedure, the English law did not favour the protection of the possessor against the true owner. It more and more diminished this protection, and more and more admitted matters of title in possessory actions, until at length it was only the freeholder taking by descent who was protected against the true owner, and it was only, therefore, a descent cast which checked the pleaders on either side in carrying back their tale of wrongs to the respective rights of possession. The action of ejectment carried still further the work of simplifying procedure, but the effect of a descent cast in separating the right of possession from the right of property continued till 1833. When, in that year, the effect of descent cast was abolished, the true principle governing title to land was established. Seisin was still, as under the writ of right, the source of a title good against strangers, but it was no longer protected against the true owner. Ownership and possession alike, therefore, obtained the proper measure of protection in the same action. The only further development (if such development has really taken place) is the substitution of possession for seisin as the source of the right of possession, or, in other words, as the source of a right of property secure against all the world except the true owner.

CHAPTER IX.

THE OLD STATUTES OF LIMITATIONS.

The policy of the law. THERE appears to be no difference of opinion as to the wisdom of assigning a definite time within which claims to land must be asserted, and of depriving of title owners who do not come forward till after that time has elapsed. For this policy various reasons have been suggested. It checks litigation—*interest rei publicæ ut sit finis litium*; it prevents improper claims from being made after the materials for defeating them have been lost; and it cures defects in titles acquired lawfully and in good faith. “The public,” said Plumer, M.R., in *Cholmondeley v. Clinton* (1820, 2 Jac. & W. at p. 140), “have a great interest in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith of which the plans

in life, habits, and expenses of himself and his family may have been unalterably formed and established—*vigilantibus et non dormientibus lex succurrit.*” (Cf. per Lord St. Leonards, in *Trustees of Dundee Harbour v. Dougall*, 1852, 1 Macq. H. L. p. 321 ; per Page-Wood, V.-C., in *Manby v. Bewicke*, 1857, 3 K. & J. p. 352 ; per Lord Redesdale, in *Cholmondeley v. Clinton*, 1821, 4 Bligh, at pp. 75, 117 ; First Report of Real Property Commissioners, p. 39.)

There are various modes in which long possession operates to create a title in the possessor. The usucapion or pre-Effect of possession on title.scription of the Roman law is positive, and creates a new title immediately the prescribed period has elapsed. The old Statutes of Limitation of the English law were purely negative. They barred the remedy of the true owner, but they did not touch his title. The possessor, therefore, acquired a title indirectly only, and this might be defeated if the true owner in any way lawfully came to the possession again. The present statutes, too, are negative, but (like fines under the old law) they at once bar the remedy and extinguish the right, and practically they create a perfect title in the possessor. They are commonly said, indeed, to transfer the estate. (See per Lord St. Leonards, in *Trustees of Dundee Harbour v. Dougall*, 1852, 1 Macq. H. L. p. 321 ; cf. *post*, p. 273.)

In the Roman law possession was no foundation for usucapion unless it had been acquired by a lawful title (*justus titulus*) and in good faith. Herein it differs from the English law, in which a title by possession depends not at all on the character of the possession or the mode in which it has been acquired. (*Vane v. Vane*, 1873, L. R. 8 Ch. p. 397.) In general a lawful title included any mode of acquisition—by sale or gift, for instance—by which the new possessor would, but for some special impediment, have become the owner. *Bona fides* implied Usucapion.

further a well-founded belief on the part of the new possessor that he had in fact become the owner, or, as Pothier says, a "*justa opinio quæsitæ dominii*" (Pand., trans. by Bréard-Neuville, xvii. p. 180). And this, in turn, depended on the following three points:—A belief on the part of the new possessor (1) that the thing was the property of the transferor; (2) that the transferor had power to transfer the property; and (3) that he, the transferee, had power to acquire it. Not till all these elements were present, as well as the *justus titulus*, was there a possession capable of ripening into ownership. When, however, the possession had commenced in this manner, and had continued for the prescribed time without interruption, it at length conferred the ownership on the possessor. The prescribed time for usucapion in the case of land subject to the *jus civile* was two years. In the provinces the same principle was introduced in the form of *possessio longi temporis*, the period being ten years between persons domiciled in the same province, twenty years when they were domiciled in different provinces. Under Justinian, *possessio longi temporis* supplanted usucapion, and prevailed throughout the empire generally. There were elaborate rules governing the interruption of possession (*usurpatio*), so as to check the lapse of time, and regulating the adding together of different possessions (*accessio*), so as to vest the title in the last possessor.

Statutes of
Limita-
tions.

In English law the effect of time has been regulated by the successive Statutes of Limitations. Originally, according to Bracton (Vol. I. 410; f. 51 b), the times of limitation were in the discretion of the judges, and when subsequently they were settled by authority this was done in an arbitrary and haphazard manner. Instead of assigning one uniform period antecedent to the bringing of all actions, or a separate period for each class of actions, fixed

dates were chosen beyond which the allegations in the pleadings might not go. Thus, before the Statute of Merton (A.D. 1236), the remotest time at which the seisin of an ancestor could be alleged in a writ of right was the beginning of the reign of Henry I. (A.D. 1100). The Statute of Merton, c. 8 (Inst. II. 94), shifted this forward fifty-four years, to the beginning of the reign of Henry II. The date of limitation in the assize of mort d'ancestor had been the first coronation of Henry II. (20 Oct. 1154). This was changed to the last return of King John from Ireland to England (A.D. 1211), and the same limitation was introduced for writs of entry. In the time of Henry II. the limitation for an assize of novel disseisin had been the last voyage of the king to Normandy (A.D. 1184). This was altered to the first voyage of Henry III. to Gascony (A.D. 1221). Thus, after the passing of the Statute of Merton, the time of limitation in a writ of right was eighty-two years; in mort d'ancestor and writs of entry twenty-five years; and in novel disseisin fifteen years. As time went on all these periods increased, and in 1275 fresh limitations were introduced by the Statute of Westminster I., c. 39.

In a writ of right the seisin of the ancestor could not be put further back than the time of Richard I., that is, the beginning of his reign, A.D. 1189 (Inst. I. 238). The limitation in mort d'ancestor and writs of entry was the coronation of Henry III., that is, 1217, the date of his first coronation. But in novel disseisin no change was made, and the disseisin might still have taken place any time since the first voyage of Henry III. to Gascony (1221). Thus after the passing of this statute the time of limitation in a writ of right was eighty-six years; in mort d'ancestor and writs of entry, fifty-eight years; and in novel disseisin, fifty-four years. All these periods seem

Statute of
Merton.

Statute of
West-
minster I.

to have been sufficiently long even when first introduced, but, as before, they increased from year to year, and this was allowed to go on for the next 266 years, until by 32 Hen. 8, c. 2, a more rational mode of limitation was introduced, and a definite period was assigned as the time within which each class of action might be brought.

32 Hen. 8, c. 2. For this purpose possessory actions were divided according as they were brought upon the seisin of an ancestor or upon the claimant's own seisin. The former included mort d'ancestor; the latter, novel disseisin. A writ of entry might fall within either class. In writs of right the demandant could not rely upon a seisin more than sixty years old at the date of the writ; in a possessory action brought on the seisin of an ancestor, the period of limitation was fifty years; and in an action on the demandant's own seisin, thirty years. *Formedon* in reverter and in remainder were regarded as of the nature of writs of right, but as in possessory actions ancestral the time allowed was fifty years.

Alternative limitation by the operation of fines.

Possibly the periods which prevailed before this statute would not have been left so long unaltered, but that a different and much speedier system of limitation was in force, a system under which, in its later form, five years might at the same time bar the remedy and extinguish the right. This was the system of fines. Originally a fine appears to have been the compromise of an actual suit, and, being equivalent to a judgment of the Court, it had the same effect as a final judgment in a writ of right; that is, it operated immediately as a perfect bar to all claims. (Cruise on Fines, I., p. 159.) According to Bracton this was the case in his time. (VI. 438; f. 435 b.) But by the reign of Edward I. a change had taken place, and claims might be brought against a judgment in a writ of right, and against a fine, within a year and a day.

The Courts, however, gave to a fine in a fictitious action the same operation as in a real action, and practically it was used as a conveyance under which, after a short time, the title of the purchaser became safe against every kind of claim. (Cruise on Fines, I., p. 161.)

All this was at common law, but since the effect of fines, so prejudicial to the titles of true owners, was grounded on their supposed publicity, it was necessary to secure that such publicity should in fact exist. Hence the statute 18 Ed. 1, stat. 4, *de modo levandi fines*, was passed, requiring that they should be publicly read, and otherwise regulating the mode of levying them. There was, however, a restriction on the power of avoiding fines, which worked great injustice, and at length led to their temporary destruction as a mode of acquiring title. They might be avoided by entry or claim made within year and day, and, when levied by a tenant for life in possession, such entry or claim made by the next remainderman avoided the fine both as to himself and as to any other subsequent remainderman; but if the next remainderman failed to avoid the fine, no one else could take this step, and by his negligence all subsequent remainders were barred. (Cruise, I., 167.) Hence, by 34 Ed. 3, c. 16, the Statute of Non-claim, fines were deprived of their effect as regards all persons other than the parties to them, it being provided "that the plea of non-claim of fines which from thenceforth should be levied should not be taken nor holden for any bar in time to come."

So the law as to fines continued for over a hundred years, but at the end of that time it was again found necessary to devise a means of quieting possession. Accordingly 1 Ric. 3, c. 7, re-introduced fines as a mode of limitation, the period of limitation being now five years, and proclamations being made essential. In the case of

future rights, the five years ran from the time when the right fell into possession, and in case of disability, from the removal of the disability. These provisions were re-enacted by 4 Hen. 7, c. 24, and it was under this latter statute that fines in modern times took effect. (3 Rep. 86 a, note (x).) A question arose whether a fine levied by tenant in tail in possession would be effectual to bar the issue in tail, and the statute 32 Hen. 8, c. 36, s. 1, was passed to settle the question against the issue.

Conusor
must have
an estate
of free-
hold.

After the statute 4 Hen. 7, c. 24, a fine without proclamations was still deprived of effect as regards persons who were not parties to the fine by the Statute of Non-claim, but if levied with proclamations it operated after five years as a bar to all present interests of persons not under disability, and in due time as a bar to all interests. But this must be taken subject to the qualification that the person who levied the fine must have an estate of freehold in the land (1 Salk. 340, note (b)), though it was not necessary that he should be entitled to such estate. It was enough that he was a freeholder by wrong, that is, that he was in the actual seisin of the fee, whether he had got it by disseisin, or abatement, or in any other way. (Cruise on Fines, p. 114; Challis on Real Property, 2nd ed., p. 360.) The estate of the party entitled was thus turned before the fine to a right of entry, or possibly a right of action. (Co. Litt. 332 b, note (1).) A fine was still avoided by entry or continual claim (Litt. s. 417; Co. Litt. 252 b, note (1)), but 4 Anne, c. 16, s. 16, nullified the entry or claim unless an action was commenced within a year, and prosecuted with effect.

Statute of
James.

Soon after the periods of the limitation of actions had been remodelled by 32 Hen. 8, c. 2, the action of ejectment began to take the place of the old real actions in all cases where a right of entry existed; but where a discon-

tinuance had been effected by a feoffment by a tenant in tail, the issue in tail had no right of entry, and were driven to their formedon. The next statute, 21 Jac. 1, c. 16, dealt with these actions only, and placed a limitation of twenty years on each. In formedon, the twenty years were reckoned "next after the title and cause of action first descended or fallen." Actions of ejectment were limited by placing a limit on the exercise of the right of entry upon which they depended, sect. 1 of the Act providing as follows:—"No person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering and their heirs shall be utterly excluded and disabled from such entry after to be made." By sect. 2, an extension of time was allowed in the case of persons under disability, and the provision that time should run from the accrual of the right of entry, saved future estates until they fell into possession. (*Doe v. Scott*, 1825, 4 B. & C. 706.)

After the passing of the Statute of James, therefore, a right to recover land might be barred either under the Statutes of Limitations (32 Hen. 8, c. 2, and 21 Jac. 1, c. 16), or by the operation of the Statute of Fines (4 Hen. 7, c. 24). But while the Statute of Fines at the same time barred the remedy and extinguished the right, the Statutes of Limitations barred the remedy only. Thus, it was held that where the issue in tail was barred of his formedon, he was not thereby prevented from pursuing a right of entry which afterwards accrued to him. (*Hunt v. Burn*, 1702, 2 Salk. 422.)

The Statute of James ran from the time when the "right or title" accrued, and, apparently, these terms mean right or title

Distinction
between
Statute of
Fines and
Statute of
Limitations.

Operation
of Statute
of James.

or title of entry. Hence it was said that the statute did not run, in the case of freeholds, until the estate had been turned to a right of entry by disseisin or otherwise; in the case of leaseholds, until the lessee had been ousted of his term. (*Reading v. Royston*, 1702, 2 Salk. 423; Prest. Abst. II. 357.) "Right," says Lord Coke, "signifieth properly, and especially in writs and pleadings, when an estate is turned to a right, as by discontinuance, disseisin, &c." (Co. Litt. 345 a.) This was where there was a right of action, whether accompanied or not by a right of entry. If there was a right of entry only, the appropriate word was "title." "'Title' properly (as some say) is, when a man hath a lawful cause of entry into lands whereof another is seised, for the which he can have no action, as title of condition, title of mortmain, &c." (Co. Litt. 345 b.) According to another mode of stating the operation of the statute, it ran so soon as there was an adverse possession, and this was defined to mean a possession inconsistent with the title of the true owner (*Cholmondeley v. Clinton*, 1820, 2 Jac. & W. 164; Roscoe's Real Actions, II. 502; 2 Sm. L. C. 9th ed. 732), or a possession taken with intention to claim title. (Angell on Limitations, 5th ed. 387.) To reconcile the two statements, it is clear that adverse possession must have been commenced by an interference with the previous estate in one of the modes referred to above; and since—to take the case of disseisin—so soon as the seisin was out of the disseisee, it was in the disseisor (Prest. Abst. II. 284), it was said that "by adverse possession must be understood, so far as respects estates of freehold, a seisin under a wrongful estate." (*Ibid.* 358.) But for some time previous to the Real Property Limitation Act, 1833, there was a tendency to treat the fact of adverse possession as not necessarily identical with the fact of disseisin.

For many purposes it was immaterial which mode of expression was adopted. There were numerous rules and presumptions in favour of the true owner which at the same time made the actual possession consistent with his title, and prevented a disseisin. Where, for example, the possessor was actually entitled to the land, though for an interest less than that which he claimed, his possession was referred to his lawful title. (*Doe v. Brightwen*, 1809, 10 East, 583.) The possession of the younger brother was the possession of the heir (Litt. s. 396; Gilbert's Tenures, 28); but in *Doe v. Lawley* (1834, 13 Q. B. 954), the Queen's Bench refused to extend this rule so as to attribute the possession of a sister to her brother. The possession of one coparcener, joint tenant, or tenant in common, was the possession of all, unless an intention to claim the whole was expressed on entering. And the possession was not adverse when it was taken with the permission of the owner. (*Doe v. Wilkinson*, 1824, 3 B. & C. 413; *Doe v. Clark*, 1828, 8 B. & C. 717; *Doe v. Grubb*, 1830, 10 B. & C. 816; *Doe v. Thompson*, 1836, 5 A. & E. 532.) Nor was it adverse in the numerous cases where a tenancy could be assumed to exist between the occupier and the owner. In this way the possession of the mortgagor was made consistent with the title of the mortgagee (*Smartle v. Williams*, 1795, 1 Salk. 245; *Leman v. Newnham*, 1747, 1 Ves. sen. 51); that of the *cestui que trust* with the continuance of seisin in the trustee. (*Keene v. Deardon*, 1807, 8 East, 248; *Smith v. King*, 1812, 16 East, 283.)

Rules preventing disseisin or adverse possession.

The fiction of a tenancy was resorted to for the purpose of avoiding a disseisin of the owner in cases where a possession, lawful in its commencement, became unlawful by being held after the possessor's interest had expired. The person so holding over, whether after the expiration

Tenant at sufferance no disseisor.

of a term of years or after the cessation of a freehold estate, was said to be tenant under the freeholder, although his tenancy was only a tenancy at sufferance. "A tenant at sufferance," says Coke, "is he that at the first came in by lawful demise, and, after his estate ended, continueth in possession, and wrongfully holdeth over." (Co. Litt. 57 b.) Hence, such a person was no disseisor so as to have an estate of freehold upon which to levy a fine. In *Doe v. Perkins* (1814, 3 M. & S. 271), A. was tenant for life, remainder to R. P. in fee. A. leased to B. for her own (A.'s) life, and died in 1799. B., who had gone into possession, held possession till his death in 1805. Thereupon his son entered, and in 1817 levied a fine with proclamations. It was held that the fine was ineffectual to bar the heirs of R. P. "To constitute a title by disseisin," said Lord Ellenborough, "there must be a wrongful entry; but here there has been no wrongful entry, but only a wrongful continuance in possession." It has been suggested (Watkins' Conveyancing, 7th ed. p. 25), that although B.'s holding over may have been no disseisin, it was different with the possession of the son. A tenancy at sufferance confers no descendible interest; hence the entry of the son was wrongful and his possession adverse. But this criticism touches only the particular case, not the principle illustrated by the decision. There is said to have been an exception in the case of estates created by act of law, and a person in possession in respect of such an estate became, on holding over, a disseisor. (Co. Litt. 57 b.)

Doubt whether tenant at sufferance was not an adverse possessor.

The doctrine that holding over created a tenancy at sufferance, and was, therefore, no disseisin, produced some difficulty when it came to be applied to disseisin for the purpose of the Statute of Limitations; and had the question continued to be one of practical importance, it would, perhaps, have led to a distinction between posses-

sion by disseisin and adverse possession. The doctrine that the statute only ran from disseisin was strictly applied in *Doe v. Hull* (1822, 2 Dow. & Ry. 38). Henry Souter died in 1790 seised of land which he had devised to his wife for life. In 1794 the widow and John Souter, a son of the testator, who claimed to be his heir-at-law, conveyed to Hull in fee. Hull entered, and died in 1814, having devised to the defendants. The widow apparently had died about 1800. Henry Souter's heir-at-law was really Whicher Souter, who, by a will made in 1810, devised his real estate to trustees, and died shortly afterwards. Upon ejectment brought by the trustees, it was contended that Hull's possession was adverse; but the King's Bench held that, at any rate, there had been no disseisin, and therefore the statute had not run. "There is," said Abbott, C.J., "no ground for saying that the adverse possession of Mr. Hull has operated as a disseisin of Whicher Souter. Mr. Hull did not take possession wrongfully; he only wrongfully continued in possession. He came in under right and title which remained good during the life estate of Henry Souter's widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance to Whicher Souter, who permitted him for a period to remain in possession."

A different view prevailed in *Doe v. Gregory* (1834, 2 A. & E. 14), where a husband, who had entered in right of his wife, held over for more than twenty years after her death. A distinction was now taken between a freehold by disseisin to support a fine and adverse possession under the statute. After referring to the argument based on *Doe v. Perkins* (1814, 3 M. & S. 271), that the husband was tenant at sufferance, and had no freehold by disseisin, Denman, C.J., said:—"We are of opinion that, though this may be so for the

*Doe v.
Gregory.*

purpose of avoiding a fine, it cannot prevent the defendant's possession from being wrongful from the very hour when his interest expired by his wife's death. It is clear that he might have been immediately turned out by ejectment. We think, therefore, that his continuing the same possession for twenty years entitles him to the protection of the Statute of Limitations, and that this action has been brought too late."

It has been suggested (2 Sm. L. C. 9th ed. 735) that, since the rightful estate of the husband had been conferred on him by act of law, the decision can be supported on the distinction noticed above, and that the husband was in fact a disseisor. But the Court made no reference to this point, and the case distinguished clearly between disseisin and adverse possession under the statute. A similar view as to the effect of holding over had been expressed by Lord Mansfield in *Doe v. Prosser* (1774, Cowp. p. 218):—"Length of possession during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title; but if tenant *pur autre vie* holds over for twenty years after the death of *cestui que vie*, such holding over will in ejectment be a complete bar to the remainderman or reversioner, because it was adverse to his title." The opposition between *Doe v. Hull* and *Doe v. Gregory* was noticed in *Eyre v. Walsh* (1860, 10 Ir. C. L. R. 346).

Adverse
possession
where
land oc-
cupied by
tenant.

Where land was in the possession of a tenant, not only was the possession consistent with the title of the landlord, but the tenant could not by himself alter its character. The duty which he owed the landlord of preserving his title prevented any acts of his from having the effect of acts of adverse possession (per Lord Eldon, C., in *Cholmondeley v. Clinton*, 1821, 4 Bligh, p. 96). By disclaiming the landlord's title he would forfeit the term (*Doe v.*

Pasquali, 1794, Peake, N. P. C. 196; *Doe v. Stanion*, 1836, 1 M. & W. 695); but the landlord was not bound to take advantage of the forfeiture, and might enter upon the natural expiration of the term (*Doe v. Danvers*, 1806, 7 East, p. 321). So where a tenant for years made a feoffment for the purpose of levying a fine. Although this was a disseisin and a forfeiture of the term, the reversioner might treat the term as subsisting, and enter within five years of its determination (9 Rep. 105 b, note (a); *contra*, where lessee was ousted by a disseisor, and the disseisor levied a fine, *post*, p. 167). And when the tenant for years became tenant at sufferance by holding over, it appears that he was still unable to disseise his landlord and gain an adverse possession, or at any rate such disseisin would not be presumed from mere length of possession. In an American case mentioned in Angell on Limitations (5th ed. p. 445) a tenant at will remained in possession of the land for fifty-seven years after the death of the landlord. Instead of presuming a direct disseisin of the heir, the jury were allowed to presume a restoration of the land to the heir, and then an actual ouster of the heir.

In cases of possession by a mortgagor and *cestui que trust* the rule was less strict. Since a mortgagor was tenant at will to the mortgagee he could not disseise him (*Cholmondeley v. Clinton*, 1817, 2 Mer. p. 360); but it came to be settled law that if he ceased to hold on behalf of the mortgagee, and commenced to hold on his own account, and against the will of the mortgagee, the jury might find that his possession was in fact adverse (*Hall v. Doe*, 1822, 5 B. & Ald. p. 690; *Doe v. Williams*, 1836, 5 A. & E. 291). And so a *cestui que trust*, although, like a mortgagor, he held as tenant at will, might renounce the title of his trustee and hold adversely to him (*E. of Portsmouth v. Lord Effingham*, 1750, 1 Ves. sen. at p. 435; *E. of Pom-*

Possession
of mort-
gagor and
cestui que
trust.

fret v. Lord Windsor, 1752, 2 Ves. sen. 472; *Faussett v. Carpenter*, 1831, 2 Dow. & C. 243; *Cholmondeley v. Clinton*, 1817, 2 Mer. 360).

Possession
by co-
owner.

A similar relaxation was made in the case of a joint tenant whose original entry was on behalf of all the joint tenants, and by actual ouster of the rest he might gain an adverse possession. "If," said Lord Mansfield in *Doe v. Prosser* (1774, Cowp. p. 218), "upon demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough." And in that case actual ouster was presumed from the interrupted receipt of rents and profits by one co-tenant without accounting for a period of nearly forty years. But no relaxation was made in the case of possession by a younger brother (Roscoe's Real Actions, II. 502), though after his elder brother had taken possession the younger brother could then disseise him (Co. Litt. 242 a).

Interfer-
ence by
stranger
during
term;
wrongful
receipt of
rent.

While land is in the possession of a tenant for years a stranger may interfere either by claiming and obtaining payment of rent from the tenant or by putting the tenant out of possession. In the first case, as already pointed out (*supra*, p. 51), there was no disseisin, save at the election of the lessor; and there seems to have been no right of entry in the lessor so as to make time run under 21 Jac. 1, c. 16. He might treat the non-payment of rent to himself as a forfeiture of the term, but he was not bound to do so, and otherwise he had no right of entry during the continuance of the term (*Doe v. Danvers*, 1806, 7 East, 299, p. 321; though see *Cholmondeley v. Clinton*, 1821, 4 Bligh, 108; 1823, 1 Turn. & R. 119). Where, however, the tenant, to the knowledge of the landlord, disavowed tenure under him and attorned to a stranger, the landlord, especially in the case of a long lease, might properly be

required to assert his title; and in *Hovenden v. Lord Annesley* (1806, 2 Sch. & Lef. p. 625), Lord Redesdale seems to have thought that the statute would run against him (cf. Angell on Limitations, 5th ed., p. 446), an opinion which was approved in *Conry v. Caulfield* (1813, 2 Ball & B. p. 273).

In the second case, where a stranger ousted the lessee, this was, unless he claimed the term merely, a disseisin of the lessor; and if the disseisor levied a fine, the lessor, as well as the lessee, was barred by non-claim for five years, and the lessor had not five years after the expiration of the term (*Margaret Podger's case*, 9 Rep. 105 b, 106 a). The freeholder, it was said, might at once bring his assise, or other real action, to recover the land; and might enter in the name of the tenant to restore at the same time the possession of the latter and his own seisin. But this was only an entry to establish his claim; he could not enter to take the profits (Co. Litt. 250 b); and the right of entry being thus limited, it was probably not such a right as would make the Statute of James run against the lessor (*Doe v. Danvers*, 1806, 7 East, pp. 311, 312, per Lawrence, J.; Roscoe's Real Actions, II. 506).

Ouster of lessee.

ADVERSE POSSESSION UNDER EQUITABLE TITLE.

The foregoing statements deal only with the operation of the statute on the legal estate in the land. Either there must have been a disseisin of the freeholder or ouster of a termor, or an adverse possession must have been gained, and from such disseisin or ouster, or from such adverse possession, whichever expression is more correct, time began to run. But the separation of estates into legal and equitable led to a state of things to which the statute was not directly applicable. As between the legal and the

Adverse possession of equitable interest.

equitable owner there was no great difficulty. Their relations had to be adjudicated upon solely in equity, and courts of equity could adopt the rule of the statute or not, as they chose. Except in cases of express trust, they did adopt it, and, in so doing, were said to act upon the analogy of the statute (*Cholmondeley v. Clinton*, 1820, 2 Jac. & W., p. 152), or even to act in obedience to the statute (per Lord Redesdale in *Hovenden v. Annesley*, 1806, 2 Sch. & Lef. 631, and in *Cholmondeley v. Clinton*, 1821, 4 Bligh, p. 119). Thus it was an established rule that a claim in equity was barred in twenty years exactly as though it were a legal claim, and there was no extension beyond this time for cases where a writ of right would have lain at law. (4 Bligh, p. 118.)

But as between two persons, each claiming the equitable estate, while acknowledging that the legal estate was outstanding in a trustee or mortgagee, the effect of the lapse of time was a matter of great controversy. Suppose A. to be legal mortgagee, B. the true owner of the equity of redemption, C. a claimant to the equity of redemption who has been for more than twenty years in possession, and who has regularly paid the interest on the mortgage. If B. seeks to redeem, A. cannot simply plead the statute. He does not deny the equity of redemption. He only wants to be sure that he re-conveys to the right person. But the right to a re-conveyance is a positive right enforced in equity, and if it is to be given to C., this means, not merely that B. is barred, but that his equity has been transferred to C. This was the difficulty that pressed on Grant, M.R., in the celebrated case of *Cholmondeley v. Clinton* (1817, 2 Mer. 171).

Cholmondeley v. Clinton : statement of case.

Samuel Rolle (for pedigree see Appendix I.), under his marriage settlement dated in October, 1704, was entitled in fee to lands in Devon and Cornwall, subject to a

term of 200 years for raising 20,000*l.* as a portion for his daughter Margaret. By his will, dated in October, 1717, he devised the lands to his wife during widowhood, remainder, in the events that happened, to his daughter Margaret for life, remainder to her first and other sons in tail male, with remainders over. Samuel Rolle died in 1719, leaving his daughter Margaret his only child and heir-at-law, who upon his death entered into possession of the estates devised to her for life. In March, 1724, she married Robert, Lord Walpole (afterwards Earl of Orford), and in July, 1724, the portion of 20,000*l.* was raised by mortgage of the lands, the remainder of the term of 200 years being assigned to the mortgagee. Of this marriage there was issue only one son, George, Earl of Orford, who upon the death of his mother Margaret in January, 1781, entered into possession as tenant in tail male under the will of Samuel Rolle, his grandfather. In the same year he suffered a recovery to the use of himself in fee, and shortly afterwards, in August, 1781, by deed reciting that he wished the estates to remain in the family and blood of Samuel Rolle, in consideration of the natural love and affection which he bore to his relations, the heirs of Samuel Rolle, and to the intent that the estates might remain in the family and blood of his late mother on the side of her father, Samuel Rolle, he settled the estates to the use of himself for life, remainder to the heirs of his body, for default of issue as he should appoint, for default of appointment to the use of the right heirs of Samuel Rolle. In 1785 George, Earl of Orford, converted the mortgage term of 200 years into a mortgage in fee, and in 1791 he died without issue, and without having made any appointment, leaving Horace, Earl of Orford, his uncle and heir-at-law.

It was contended by the plaintiffs in the suit that the

ultimate limitation in the deed of 1781 to the right heirs of Samuel Rolle vested the fee in Earl George, that he died seised in fee of the equity of redemption, and that this descended, therefore, to Earl Horace. But in 1791 Earl Horace had been advised that the estates went to the heir of Earl George *ex parte materna*, who was Lord Clinton, the father of the defendant. Hence he allowed Lord Clinton to enter, and Lord Clinton, in 1792, settled the estates upon trusts which gave an estate tail to his eldest son. Subsequently a doubt arose whether the deed of 1785, converting the mortgage term into a mortgage in fee, had not revoked the uses of the settlement of 1781, and thereby defeated the limitation to the right heirs of Samuel Rolle. But Earl Horace, being advised that the doubt was unfounded, and that, the object of the deed being merely to transfer an incumbrance, the uses were only revoked *pro tanto*, in 1794, at the request of Lord Clinton, executed a deed by which he confirmed the lands to the trustees of Lord Clinton's settlement upon the trusts of that settlement in the same manner as if the deed of 1785 had not been made. Lord Clinton the elder died in 1798, leaving the defendant, Lord Clinton, his eldest son and heir-at-law, who thereupon entered into possession, claiming to be entitled as tenant in tail under the settlement of 1792, subject to the mortgage.

In 1796 Earl Horace died, having devised all his residuary real estate to the plaintiff Mrs. Damer, and leaving the Marquis Cholmondeley, the other plaintiff, his heir-at-law. The plaintiffs, being in doubt as to the effect of the devise, entered into an agreement to divide the mortgaged estates, and then jointly filed a bill against Lord Clinton and the mortgagee under the deed of 1785, praying for redemption and re-conveyance, and that Lord Clinton might be decreed to deliver up possession. Their claim

was founded on the contention already noticed, that the limitation in the deed of 1781 to the right heirs of Samuel Rolle vested the equity of redemption in Earl George in fee, and they got rid of the confirming deed of 1794 by the allegation that this only removed the doubt occasioned by the mortgage deed of 1785, and did not affect any rights Earl Horace might have on the true construction of the deed of 1781. The defendant, on the other hand, contended that, under that deed, the limitation to the right heirs of Samuel Rolle carried the estates to such person as was heir-at-law of Samuel Rolle upon the death of Earl George without issue; that the confirming deed of 1794 debarred Earl Horace and persons claiming under him from making any claim; and he pleaded the statute. The case came in the first instance before Sir William Grant, M.R., and he was of opinion, on the first point, that Lord Clinton took no interest under the settlement of 1781, and on the second, that the confirming deed of 1794 operated only to remove the specific objection to Lord Clinton's title, and did not prevent Earl Horace and those representing him from setting up a fresh objection founded on the construction of the deed of 1781. This made it necessary, therefore, to determine whether, notwithstanding his want of title, Lord Clinton could shelter himself under his long possession.

The case was regarded as one of the greatest importance (see per Lord Eldon, C., 4 Bligh, p. 38), and the arguments and judgments are reported at unusual length. Had there been no mortgage it was clear that the plaintiffs, claiming through Earl Horace, would have been barred. His title accrued on the death of Earl George in 1791, and the bill was not filed till 1812. More than twenty years, therefore, had elapsed. Did, then, the fact that the legal estate was outstanding make any difference? For the plaintiffs it was argued that Lord Clinton was at law

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tenant at will to the mortgagee, and consequently there had been no disseisin of the legal owner. This being so, the legal owner held on behalf of the person really entitled. In other words, the possession of the mortgagee (by his tenant) kept alive the equity of redemption in Earl Horace. Time had not run between Lord Clinton and the mortgagee so as to debar the latter from recovering possession; neither had it run between the mortgagee and Earl Horace, so as to bar the earl's right to redeem. In general, it was admitted, the mortgagee can by twenty years' possession bar the mortgagor, but that was where there had been no recognition of the mortgage. Here the mortgage had been kept alive by the payment of interest, and such payment, it was said, kept it alive for the benefit of the true owner. Thus Earl Horace was entitled to redeem the mortgagee, and the mortgagee was entitled to recover against Lord Clinton. For Lord Clinton it was argued that the suit was not simply a suit for redemption. Substantially it was a suit by persons claiming under Earl Horace to recover possession of the land, and since in equity the equity of redemption was treated as the ownership of the land, and the mortgagor, if in possession, had an equitable seisin (*Casborne v. Scarfe*, 1737, 1 Atk. 603); the suit ought to be treated as though the legal ownership was in question. In other words, the claim of the plaintiffs was a direct claim to possession as against Lord Clinton, and not merely an indirect claim through the mortgagee.

Judg-
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Grant,
M.R.

Sir William Grant acceded to the argument for the plaintiffs. He was of opinion that for the statute to run there must be a disseisin of the legal owner. Had an equitable disseisin been possible, this might have made time run against the equitable owner, but he denied that this was possible. "Though there may be what is termed a seisin of an equitable estate, there can be no disseisin of

it; first, because the disseisin must be of the entire estate, and not of a limited and partial interest in it—the equitable ownership cannot possibly be the subject of disseisin; and secondly, because a tortious act can never be the foundation of an equitable title.” For the first point he relied upon a dictum of Lord Hardwicke in *Hopkins v. Hopkins* (1738, 1 Atk. 581), that, though a trustee might be disseised, and so the *cestui que trust* might be affected, yet on the trust itself no estate could be gained by disseisin; and as to the second, he insisted that the statute could not transfer an equity. “An equitable title may undoubtedly be barred by length of time, but it cannot be shifted or transferred. What was once my equity may, by my laches, be wholly extinguished; but it cannot, without my act, become the equity of another person.” (2 Mer. p. 358.) And as Lord Clinton’s possession was not a disseisin of Earl Horace, so as to make time run against him directly, neither did it affect the indirect right through the mortgagee. The mortgagee could recover at any time against Lord Clinton, his tenant at will, and the land when recovered would be held for the person rightfully entitled. Hence Grant, M.R., considered that the length of Lord Clinton’s possession was no bar to the plaintiff’s claim. Inasmuch, however, as Lord Clinton’s counsel desired that the first point, the construction of the deed of 1781, should be sent to a court of law, no decree was pronounced, and, so far, the result was simply to intimate Sir W. Grant’s opinion.

In the King’s Bench the case was twice argued on the first point (2 B. & Ald. 625; 2 Jac. & W., 2), and a majority of the Court held that the words “the right heirs of Samuel Rolle” denoted Earl George, and that consequently Lord Clinton, the father of the defendant, took no estate under the deed of 1781. Upon this finding the cause came on for further hearing before Sir Thomas

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Plumer,
M.R.

Plumer, who had succeeded Sir William Grant as Master of the Rolls, and it fell to him to deliver judgment in the cause. With the decision of the King's Bench he disagreed, and he would have sent the first point back for a second consideration, but as he differed from Sir William Grant on the effect of the defendant's possession, and as his judgment was affirmed by the House of Lords, this became unnecessary. The arguments for the defendant at the second hearing were directed to combating Sir William Grant's positions, that there could be no equitable disseisin, and that the trustee, so long as his estate was not interfered with, held for the original *cestui que trust* or equitable owner. As to the former point it was urged that Sir William Grant had misunderstood the idea intended to be conveyed by the term "equitable disseisin." If the actual occupation of the land or receipt of rents and profits under a mortgagee gave equitable seisin, then the usurpation of this position by a stranger, to continue the analogy, must constitute an equitable disseisin, or, as Butler, in his argument, put it (2 Jac. & W. p. 52), a *quasi-disseisin*. In fact, however, so it was urged, the statute ran, not upon a disseisin only, but whenever there was an adverse possession, and Lord Clinton's possession, though not adverse to the mortgagee, was adverse to Earl Horace; and allowing that the mortgagee, while the mortgage was kept alive, held for the rightful owner, yet this left untouched the question who was the rightful owner, and it was contended that the effect of long possession had been to transfer the ownership to Lord Clinton.

Judgment
of Plumer,
M.R.

These arguments prevailed with Sir Thomas Plumer. He adopted the view that a court of equity ought not to regard the legal relationship of trustee and *cestui que trust*—ought not, that is, to reason on the assumption that the *cestui que trust* was tenant at will to the trustee. The

equitable estate, as Lord Mansfield said in *Burgess v. Wheate* (1759, 1 Eden, p. 224), is, in a court of equity, treated as the land, and the rules of law are by analogy applied to it. Extending this analogy to the Statute of Limitations, it was clear that a stranger who usurped the equitable estate—who became *de facto* equitable owner—could exclude the title of the true owner; in other words, putting the legal estate aside, the suit was by the true owner, who had been more than twenty years out of possession, against the actual possessor, and upon the analogy of the statute it was barred. Here the judgment might have stopped; but in deference to his predecessor, Sir Thomas Plumer investigated the grounds of the opinion he had expressed, and for this purpose he dealt first with the case of equitable estates generally, and next with the particular case of an equity of redemption.

As to equitable estates generally, there were the two points that, since the legal estate was in the trustee, they could not be the subject of disseisin, and that a tortious act could not in equity confer a title. As to the first, the Master of the Rolls, adopting the argument of the defendant's counsel, held that a technical disseisin was not necessary for the operation of the statute; it was sufficient if there had been a possession *de facto* adverse to the claimant; and as to the second, he held that the possessor gained a title at law, not by reason of his tortious possession, but because his opponent's title was barred by the statute. Hence, when this bar applied in equity, the same result followed, and the equitable title was necessarily transferred. "The question respects the plaintiff's right to the remedy, not the defendant's title to the estate. A tortious act can never be the foundation of a legal, any more than of an equitable, title. It is no more favoured in a court of law than a court of equity, considered

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time on
equitable
estates
generally.

nakedly by itself; but the statutable bar arises from other principles. . . . To advert to the merits is to shift the question from the real subject of inquiry. The case never arrives at that point; it is stopped *in limine*, equally in the courts of equity as of law" (2 Jac. & W. p. 155). Hence, although the legal estate was outstanding, the *de facto* adverse possession of the defendant was sufficient to make time run against the claimant. The contention that a trustee, while his estate existed, necessarily held for the actual *cestui que trust*, was refuted, it was pointed out, by the settled law as to outstanding terms. Although such a term was properly held for the first equitable owner, yet a person with a puisne equitable title, by getting it in, might gain priority. "The trust of the legal estate does not govern, but follows the equitable title. The latter, in the changes which it undergoes by the act of the party, or by operation of law, attracts to, and draws after it, the trust of the legal estate" (*ibid.* p. 160). Consequently, where the equitable owner had lost his estate by lapse of time, the equitable title was transferred to the *de facto* equitable owner, and for him the legal estate was held.

In the result, after reviewing the cases relied upon by Sir W. Grant, Sir Thomas Plumer (2 Jac. & W. p. 175) conceived it to be established, both on principle and authority, that the non-claim of the rightful owner of an equitable estate for a period of twenty years (supposing the claim must have been made within that period, if it was a legal estate) would constitute a bar to equitable relief, by analogy to the statute, if, during all that period, possession had been held under a claim unequivocally adverse, and without any recognition of the title of the rightful owner; and that this would not be prevented by the existence of the legal estate unbarred in a trustee, if nothing was done to admit this to be held for the rightful owner; but, on

the contrary, it was uniformly treated as belonging to the claimant in possession as the sole and exclusive *cestui que trust*.

So far where the legal estate existed unbarred in a person sustaining the character of a trustee. In the case of a mortgage the result was still clearer. It had been argued that the mortgagee was a trustee for the mortgagor, and that the recognition of the mortgage, even by an adverse possessor, kept it alive for the original mortgagor. But, as to the first point, Sir Thomas Plumer observed that the mortgagee was in a very different position from a mere trustee with no beneficial interest; he could only be said to become a trustee when the mortgage was paid off, and then he was a trustee to convey the legal estate to the person entitled. And as to the recognition of the mortgage by payment of interest, this was really an additional act of ownership on the part of the actual possessor, and could not be an admission of title in the mortgagor. "By making the payment in his own name, and on his own account, he takes upon himself to do an act that belongs to the mortgagor, and thereby virtually declares that character to belong to himself. It would be a perversion of inference to convert an act, done for the purpose of the assumption of the character exclusively to himself, into an admission of its belonging to another" (2 Jac. & W. p. 180). Even if the mortgagee were strictly a trustee for the mortgagor, still, on the principle stated above, the mortgagor, his *cestui que trust*, would have been barred. But in fact the mortgagee was merely an incumbrancer, and, subject to his rights, the title to the land was to be determined upon ordinary principles. In the case of a contest the mortgagee was a mere indifferent stake-holder, and must convey to him who showed a title, but this did not mean the original title. "I agree that the Court, to whom the

Effect of
time on
equity of
redemption.

decision of the question is referred, must direct the conveyance to be made to him who shows a title, and not to him who shows none; but I do not agree that Mrs. Damer stands in the first of those predicaments, by showing a title that once belonged to her, but which has been forfeited and lost by the operation of a public law, in consequence of laches and non-claim for twenty years; nor that Lord Clinton is in the second, who shows quiet and uninterrupted possession and enjoyment during the whole of that period." (2 Jac. & W. p. 186.) Upon the ground, therefore, that Mrs. Damer's right to sue was barred, the bill was dismissed.

Judgment
of the
House of
Lords.

Upon appeal to the House of Lords judgments were delivered by Lord Eldon, C., and Lord Redesdale. (1821, 4 Bligh, 1.) Lord Eldon (p. 83) distinguished between express trusts such as exist between a trustee and a *cestui que trust*, and the trust which was for some purposes recognized as existing between mortgagor and mortgagee, and he confined his judgment to the case of an equity of redemption. As to this he held that a possession, which was in fact adverse to the title of the mortgagor, produced the same effect as disseisin, and attracted the operation of the statute. "Without entangling myself with the difficulties of seisin and intrusion, I am of opinion that the adverse possession of an equity of redemption for twenty years is a bar to any other person claiming that equity of redemption; and it is an adverse possession which produces the same effect as those things you call abatement, intrusion and disseisin, which belong to legal estates." Lord Redesdale, too (p. 106), contemplated specially the case of mortgagor and mortgagee. The doctrine of the mortgagor being tenant-at-will to the mortgagee was, he said, founded upon the principle of effectuating the security of the mortgagee, and for

no other purpose; and being founded upon that view was to be carried no further; he questioned the correctness of the report of *Hopkins v. Hopkins* in 1 Atk. (p. 591), which attributed to Lord Hardwicke the dictum that on a trust in equity no estate could be gained by disseisin; he held that courts of equity were bound by the Statute of Limitations, the right to file a bill corresponding to the legal right of entry; and he observed that the actual possession and enjoyment of the estate by the receipt of the rents and profits, whether by the hands of the tenant or the owner actually taking the profits from the land, was the possession which courts of equity were bound to protect. Hence, treating the equitable estate of the mortgagor on the same footing as if it was a legal estate, he held that the plaintiffs were barred by the twenty years' adverse possession of the defendant and his father.

CHAPTER X.

THE REAL PROPERTY LIMITATION ACTS.

Abolition
of old
doctrine of
adverse
possession.

UNDER the Statute of James, time ran from the accrual of the right of entry, but no rules were introduced for the purpose of ascertaining the date of such accrual, and this was determined, in the manner described in the previous chapter, by the doctrine of adverse possession. In principle that doctrine was sound. It secured that the title of the true owner should not be endangered until there was a possession clearly inconsistent with its due recognition. But the doctrine was difficult of application, it being no easy matter to discover at what exact time the possession had assumed this character, and, moreover, its operation was fettered by rules which settled that in certain cases the possession, although held without title, or without sufficient title, was not to be deemed to be adverse. Such were the rules that the possession of a younger brother was the possession of the heir; that the possession of one of several co-owners was the possession of the rest; and that a tenant for years continued to hold for his lessor after the term had expired. Under the R. P. L. A., 1833, s. 2 (replaced by the R. P. L. A., 1874, s. 1), it is still true that time runs from the accrual of the right of entry or other remedial right, and where no specific rule is given in the Acts, the date of accrual has still to be determined upon general principles (*Pugh v. Heath*, 1882, 7 App. Cas. p. 238; *James v. Salter*, 1837, 3 Bing. N. C. p. 553); but for nearly

all cases in which the statutes can operate, specific rules are laid down for ascertaining the date of accrual, and the rules which formerly prevented possession from being adverse are expressly or impliedly abolished. Section 12 of the Act of 1833 provides that the possession of one of several co-owners is not to be deemed to be the possession of the rest; section 13, that the possession of a younger brother is not to be deemed to be the possession of the heir; and sections 3 (clause 4; see now sect. 2 of the Act of 1874), 7, and 8, enable a tenant, whether for years or from year to year, or at will, to gain a title against his landlord by holding over after the time when the tenancy has actually expired, or for the purpose of the statutes, is to be deemed to have expired. Hence, it was held, soon after the passing of the Act of 1833, that the effect of the Act was to abolish the old doctrine of adverse possession. (*Nepean v. Doe*, 1837, 2 M. & W. p. 911; *Culley v. Taylerson*, 1840, 11 A. & E. p. 1015.) The system of limitation by the operation of fines was terminated by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74, s. 2).

But although the old doctrine of adverse possession has been abolished, it is still convenient to speak of a possession in favour of which the statute is running as adverse. (See *per* Lord St. Leonards in *Dean of Ely v. Bliss*, 1852, 2 D. M. & G. p. 477.) In general, possession is adverse in this sense whenever it is held without title, but the old rule that possession, when possible, is to be referred to a lawful title (*Doe v. Brightwen*, 1809, 10 East, 583) still holds good. (*Thomas v. Thomas*, 1855, 2 K. & J. p. 83.) A possession, however, held under title may be adverse, and a possession without title may, for some purposes, be non-adverse. A tenant at will who holds for more than a year remains tenant at will, and is in possession under that title, yet the statute is running in his favour; on the

Adverse
possession
under the
R.P.L.
Acts.

other hand, where land is subject to a mortgage, the statute does not run against the mortgagee in favour of a stranger in possession of land so long as the mortgagor pays interest to the mortgagee, or, more strictly, such payment of interest continually checks the operation of the statute. (*Doe v. Eyre*, 1851, 17 Q. B. 366; *Doe v. Massey*, 1851, 17 Q. B. 373; *Ford v. Ager*, 1863, 2 H. & C. 279.)

Possession
of bailiff.

Moreover, under the R. P. L. Acts, it is still necessary to consider the character of the possession. Where possession is held by a servant or bailiff, this is the possession of the employer, and there is no dispossession of the employer so as to make his right of entry accrue and the statute run. (*Moore v. Doherty*, 1843, 5 Ir. L. R. 449; *Allen v. England*, 1862, 3 F. & F. 49, note.) In other words, the possession of a bailiff is non-adverse; and since a parent or other near relation entering on the land of an infant is deemed to enter as bailiff, this principle has been applied to save the title of the infant. (*Thomas v. Thomas*, 1855, 2 K. & J. 79; *Wall v. Stanwick*, 1887, 34 Ch. D. 763.) In such a case the possession remains non-adverse, even after the infant has attained twenty-one, until something has been done to change its character. (*Hobbs v. Wade*, 1887, 36 Ch. D. 553; *Tinker v. Rodwell*, 1893, 9 Times L. R. 657.) So, too, although a receipt of rents by a person "wrongfully claiming to be entitled" is now adverse, and attracts the operation of the statute (R. P. L. A., 1833, s. 9), this result is avoided where the receipt is by an agent (*Ward v. Carttar*, 1865, L. R. 1 Eq. 29; *Smith v. Bennett*, 1874, 30 L. T. 100); and it is immaterial that the agent is acting for an unknown owner, provided the owner is subsequently discovered and ratifies his agency. (*Lyell v. Kennedy*, 1889, 14 App. Cas. 437.)

Principle
of the
R.P.L.
Acts.

The general rule of the R. P. L. Acts is now contained in sect. 1 of the Act of 1874, which enacts that after the

commencement of the Act "no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same." Thus the Acts suppose a right in land and a violation of that right; thereupon a remedy by entry, distress, or action accrues, and if not prosecuted within the prescribed period the remedy is barred. Under sect. 34 of the Act of 1833, the right also is extinguished, and the result is to create a new title to the land in the adverse possessor.

Thus, provided there is an independent adverse possession in the sense just described, the operation of the statute does not depend upon any question of its nature, whether, for example, it is *bonâ fide* or meritorious. (*Vane v. Vane*, 1873, L. R. 8 Ch. 397; cf. *Tuthill v. Rogers*, 1844, 1 Jo. & Lat. p. 64.) Herein, as already observed (*ante*, p. 153), the English law of the limitation of actions differs from the Roman law of prescription.

And when the statute has commenced to run against a person entitled, it continues to run both as against him and persons deriving title under him, or, more correctly, against persons claiming through him within the meaning of the phrase, "person through whom another is said to claim," as defined in sect. 1 of the Act of 1833. Thus the statute runs also against the heir, issue in tail, tenant by the curtesy, tenant in dower, successor, special or general occupant, executor, administrator, legatee, hus-

Statute runs in spite of devolution of title.

band, assignee, appointee, devisee, and the lord claiming by escheat.

There must be a possession to benefit by statute.

For the statute to run, however, it is not sufficient that the true owner should be out of possession; there must be a person in possession in whose favour it can run. (*Smith v. Lloyd*, 1854, 9 Ex. 562.) And this principle is applied also with reference to the continuing operation of the statute. It ceases to run so soon as the possession ceases in favour of which it was running. (*Trustees Agency Co. v. Short*, 1888, 13 App. Cas. 793.)

Arrangement of subject.

In describing the operation of the R. P. L. Acts the points to be dealt with are (1) the rights with which they deal; (2) the remedies liable to be barred; (3) the dates of accrual of the remedies; (4) the methods in which the statutory period is extended or diminished; (5) the modes in which the bar of the statute is prevented; and (6) the nature of the new possessory title. Under the third head will be noticed the operation of the Acts in the various cases which ordinarily arise.

I. THE SUBJECT-MATTER OF THE ACTS.

Scope of the R.P.L. Acts.

The subject-matter of the R. P. L. Acts is given by the terms "land" and "rent" (Act of 1874, s. 1), and the phrase "sum of money . . . charged upon or payable out of any land or rent" (Act of 1874, s. 8); and these correspond respectively to the various interests which give a right to possession of the land or receipt of rents and profits; to a periodical sum payable out of the income of land; and to a capital sum payable out of land. A good possessory title to land cannot be acquired until all such rights have been cleared off by the lapse of time. The Acts deal also with arrears of dower, rent, and interest.

1. *Land.*

By the definition clause (1833, s. 1), the word "land" Land. extends to all corporeal hereditaments, "and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure." The definition thus includes land, regarded as a physical thing, and also the estates and interests which may exist in it. Ordinarily an estate or interest in land involves, at some time or other, a right to possess the land, though the term "interest" is not thus restricted, and it applies to a charge on land (*Driver v. Broad*, 1893, 1 Q. B. 744), or to a right to the proceeds of sale of land. (*Bowyer v. Woodman*, 1867, 3 Eq. 313.) For the purpose of sect. 1 of the Act of 1874 it is in general sufficient to regard "land" as meaning the physical thing. The right of entry is exercised, or the action brought, to recover possession of the land itself, and Lord St. Leonards recognized this in *Dean of Ely v. Bliss* (1852, 2 D. M. & G. p. 473), when he said: "The Act does not deal with land in any other sense than in that where a person has the right to the land itself." But, when necessary, the term will be taken to refer to an interest in land, as in *Heath v. Pugh* (1881, 6 Q. B. D. 345; 7 App. Cas. 235), where it was held that a foreclosure action is an action to "recover possession of land," on the ground that the mortgagee practically obtains a transfer to himself of the mortgagor's equity of redemption. The estates and interests, however, affected by sect. 1 of the Act of 1874 must involve a right to possess the land, and their nature is determined by the various modifications of which ownership is capable.

The full ownership, represented by an estate in fee simple, may be divided into a series of successive estates, Modifications of ownership.

or may be shared between two or more persons enjoying the land simultaneously, or, to use the language of the Settled Land Act, 1881, s. 2 (6), concurrently. Hence the distinction between present and future estates, and hence the various forms of co-ownership. But in either case the person entitled enjoys, so soon as his estate falls into possession, and subject to the restrictions imposed by its nature, the full advantages of ownership; in other words, the different estates, when they come to be actually enjoyed, are of the same nature. A further modification of the rights which go to make up ownership is effected when the ownership is divided into estates or interests which are of different natures. This happens in the case of trusts, where the legal owner and the beneficial owner are different persons. It happens in the case of mortgages, where again the legal estate, or the right to get it in, is in the mortgagee, while the actual enjoyment usually remains with the mortgagor. And the ownership may be divided, too, by reason of peculiarities of tenure, as in the case of lord and copyholder. These subdivisions of the ownership into interests of quite different natures may co-exist with the division of any of such interests into successive or concurrent estates in the manner just described.

Landlord
and
tenant.

Separate treatment must be given to the division of rights between landlord and tenant, or, in other words, between owner and occupier. The landlord parts with his right to possession, and, so far as this is concerned, he is in the same position as the remainderman after a particular freehold estate. (Cf. Co. Litt. 143 a.) Both the landlord and the remainderman must wait for the determination of the prior interest before their right to possession of the land arises, and in respect of such right each has merely a future interest. Consequently, in the absence of special

provision, a landlord's rights are governed by the general provisions of the R. P. L. Acts relating to future interests. But for practical purposes the cases are widely different, the landlord being in fact in the present enjoyment of the advantages of ownership. Sometimes, indeed, the landlord is spoken of as though he was in possession of the land by means of his tenant (*Lyell v. Kennedy*, 1889, 14 App. Cas. 437), but this is not correct. The possession of the tenant supports the seisin of the landlord (*Bushby v. Dixon*, 1824, 3 B. & C. p. 304), and so in *Doe v. Finch* (1832, 4 B. & Ad. at p. 300), Denman, C. J., observed, "Where it is said that the possession of tenant for years is the possession of the party entitled to the freehold, that imports that such person is seised of the estate of freehold." But the seisin must be distinguished from the possession, the latter being ascribed exclusively to the tenant. While, however, this is true with regard to possession of the land, the receipt of rent marks the landlord as being in present possession of his rights as owner, and this is recognized in the Conveyancing Act, 1881, s. 2 (iii), and the Settled Land Act, 1882, s. 2 (10), (i), where possession is defined as including the receipt of income. Consequently, although in the operation of the R. P. L. Acts, it is only actual possession which in general is contemplated, the theory has to be modified in dealing with the rights of landlords, and under certain circumstances a lessor is regarded as having a present interest which is liable to be barred. At the same time the lessee has a right of property which is capable of modification, and it may, and, in cases where the lease is not at a rack rent, frequently is, dealt with on the same footing as the ownership. It is divided into successive or concurrent interests, and is made subject to trusts and mortgages,

2. *Rent-charges.*

Rent.

The definition clause extends the word "rent" to all heriots, to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); but any of these meanings may be excluded "where the nature of the provision or the context of the Act" so require, and the result is that, so far as sect. 1 of the Act of 1874 is concerned, heriots and conventional rents reserved on leases for years are altogether excluded.

Exclusion
of heriots
and rents
on leases
for years.

As to heriots, this construction of the section is settled by *Owen v. De Beauvoir* (1847, 16 M. & W. 547); *Earl of Chichester v. Hall* (1851, 17 L. T. 121); and *Lord Zouch v. Dalbiac* (1875, L. R. 10 Ex. 172), on the ground that the right to take a heriot only arises at irregular intervals, and, on the strict interpretation of the statute, it might be barred before there has been any chance of asserting it. That conventional rents are not included, but only rents in the nature of rent-charge, was settled on somewhat technical grounds in *Grant v. Ellis* (1841, 9 M. & W. 113), and the decision has been accepted as correct. (*Archbold v. Scully*, 1861, 9 H. L. C. p. 375; *Irish Land Commission v. Grant*, 1884, 10 App. Cas. p. 26.) The distinction, however, is a clear one, and is justified by the general framework of the Acts. Rent, in the sense of rent-charge, is a species of property forming an incumbrance on the ownership of land. It is a right to demand from the owner a share of the annual profits of the land. A conventional rent reserved on a lease, on the other hand, is paid to the owner as a return for the occupation and use of the land. In the one case the rent is an incumbrance on the ownership, in the other it is an incident of the ownership. For many purposes a copyholder ranks as owner,

and copyhold rents due from him, being of the nature of rent-charge rather than of rent payable for the use of land, have been held to be within the statute. (*Howitt v. Earl of Harrington*, 1893, 2 Ch. 497.)

And the statute runs not only as between rival claimants to the rent-charge, but also in favour of the person liable to pay. (*Irish Land Commission v. Grant*, 1884, 10 App. Cas. 14.) In the case of tithe rent-charges, there was formerly some doubt on this point, especially in Ireland, on account of the analogy of such rent-charges with tithes, which were placed by the Act of 1833 on the same footing as land, and in consequence of some remarks of Lord St. Leonards in *Dean of Ely v. Bliss* (1852, 2 D. M. & G. 459; cf. *Netterville v. Power*, 1861, 13 Ir. Jur. 123).

Statute runs in favour of person liable to pay rent-charge.

A periodical sum of money may be "charged upon land" within the meaning of the statute, and may be, therefore, liable to be barred as a rent, although no remedy lies for it against the land. It is sufficient that no person can occupy the land without rendering himself liable to pay. (*Payne v. Esdaile*, 1888, 13 App. Cas. 613.)

"Charged upon land."

3. *Capital Charges and Arrears of Rent and Interest.*

The R. P. L. Acts apply also to sums of money "charged upon or payable out of any land or rent" (Act of 1874, s. 8, replacing Act of 1833, s. 40); and they impose a six years' limitation on arrears of dower (Act of 1833, s. 41), and on arrears of rent, and of interest in respect of sums of money "charged upon or payable out of any land or rent" (Act of 1833, s. 42). Under "arrears of rent" are included arrears of rents reserved on leases. (*Archbold v. Scully*, 1861, 9 H. L. C. p. 375.) The restriction of sect. 42 upon the recovery of more than six years' arrears of interest does not apply as against a subsequent incumbrancer as long as a prior incumbrancer is in possession.

Money charged on land, &c.

II. REMEDIES WHICH ARE BARRED.

Remedies
in respect
of land
and rent.

After the statutory period has elapsed the person who was entitled cannot "make an entry or distress, or bring an action or suit to recover any land or rent." (R. P. L. Act, 1874, s. 1.) The phrase "action to recover land" has received a wide construction, so as to include not only actions which have for their immediate object the recovery of possession of land, but also all actions, such as an action to compel the lord of a manor to admit the heir of a deceased copyhold tenant, which are intended to have this result. (*Walters v. Webb*, 1870, L. R. 5 Ch. 531.) And it is the same whether the remedy is at law or in equity, the former discretion of Courts of Equity having been put an end to by sect. 24 of the Act of 1833. (*Berrington v. Evans*, 1835, 1 Y. & C. 434.) Moreover, the Act of 1874 expressly extends to suits, and shortly after it was passed the distinction between actions and suits was abolished. (Judicature Act, 1875, s. 16; Rules in First Schedule, Ord. 1, r. 1.) At one time it was thought that a foreclosure action was in substance an action for the recovery of money (*Dearman v. Wyche*, 1839, 9 Sim. 570), but the object of the mortgagee in bringing the action is to exclude the mortgagor's equity of redemption, and at the same time to convert himself from a mere incumbrancer into the owner of the land; and it is now settled that the action ranks as an action to recover land within the meaning of sect. 1 of the Act of 1874. (*Wrixon v. Vyze*, 1842, 3 Dr. & War. 104; *Heath v. Pugh*, 1881, 6 Q. B. D. p. 364; *Harlock v. Ashberry*, 1882, 19 Ch. D. 539.)

Remedies
in respect
of sums
charged
on land
and

With respect to sums charged on land, there may be a real remedy against the land, and at the same time a personal remedy against the debtor, and so with respect to arrears of rent and of interest. Hence some difficulty has

arisen, personal remedies being also subject to the bar of 3 & 4 Will. 4, c. 42. As to sums of money secured by covenant, and also charged on land, there was formerly no discrepancy, the statutory period of twenty years being the same under sect. 40 of c. 27 and sect. 3 of c. 42; but as to arrears of interest, it was necessary to determine whether the six years of sect. 42 of c. 27 barred the real and the personal remedy, or whether it barred the real remedy only, leaving the personal remedy to the twenty years' limitation of c. 42. In *Hunter v. Nockolds* (1850, 1 Mac. & G. 640) the latter view was taken, and the real and the personal remedies accordingly each had their separate period of limitation; or, more strictly, while all remedies, real and personal, were *prima facie* barred by c. 27, an exception as to actions on a covenant or on an indenture of demise was introduced by c. 42. But when in 1874 the period in respect of sums of money charged on land was shortened to twelve years, the question was raised afresh, and it was necessary to determine as to such sums whether sect. 8 of the Act of 1874 barred the real remedies only, leaving the remedy on the covenant to the twenty years of 3 & 4 Will. 4, c. 42. In *Sutton v. Sutton* (1882, 22 Ch. D. 511) it was held by the Court of Appeal that the old doctrine as to c. 42 being an exception out of c. 27 could not influence the construction of the Act of 1874, and that sect. 8, in barring generally any action or suit for the recovery of money charged on land, must be taken to bar all remedies alike, both real and personal. Consequently where money is charged on land and secured also by covenant, the remedy against the land and the remedy on the covenant are both barred in twelve years. But there has been no corresponding re-enactment of sect. 42 of the Act of 1833, and as to arrears of interest and of rent, whether rent-charge or rent-service, the law still remains

as settled in *Hunter v. Nockolds*. In proceedings against the land only six years' arrears can be recovered; but in proceedings on a covenant, or on an indenture of demise, the twenty years' limitation prevails. As to rent, a decision to this effect was given by North, J., in *Darley v. Tennant* (1885, 53 L. T. 257).

III. DATE OF ACCRUAL OF RIGHT OF ENTRY OR ACTION.

General
principle.

As already stated (*ante*, p. 182), sect. 1 of the R. P. L. A. 1874, lays down the rule that time under the statute runs from the date when the remedial right—whether by entry, distress, or action—accrues to the claimant or his predecessor in title. This date, then, is all important, and in a large number of cases directions are specifically given as to the time when the remedial right is to be deemed to have accrued. To such an extent is this done, that it was formerly a matter of doubt whether the Legislature did not intend thus to provide for all cases falling within the operation of the statute, and on this assumption any case not expressly provided for would not be subject to any period of limitation. It is settled, however, that the sections which fix the date when the remedial right shall be deemed to have accrued are not necessarily exhaustive (*Pugh v. Heath*, 1882, 7 App. Cas. p. 238; *James v. Salter*, 1837, 3 Bing. N. C. p. 553); and where they afford no guidance, recourse must be had to the general principle of sect. 1 of the Act of 1874. Time in such cases runs from the actual date of accrual of the remedial right, and this ordinarily corresponds with the date of the infringement of a substantive right. The latter is either a right to the possession of the land, or to the receipt of a rent-charge. It is infringed as to land, when possession is wrongfully taken or withheld; as to a rent-charge, by non-payment

of the rent. In stating more exactly the date of accrual, whether actual or statutory, for the various cases which may arise, it will be convenient to follow the arrangement suggested by the above account of the subject-matter of the Acts (*ante*, p. 185). We have thus to deal with (1) Present interests in land or rent; (2) Future interests; (3) Trustee and *cestui que trust*; (4) Mortgagor and mortgagee; (5) Lord and copyholder; (6) Landlord and tenant; (7) Capital sums charged on land.

1. PRESENT INTERESTS.

The statute may begin to run against a person having a present interest in land or in a rent-charge upon either of two events. He may have been in possession of the land or in receipt of the rent, and may have been dispossessed or have ceased to receive the rent; or, although his title has arisen, he may have failed to enter into possession of the land or into enjoyment of the rent. These two cases—loss of possession and failure to take possession—are separately provided for.

(1.) *Loss of Possession.*

The Act of 1833 provides, by sect. 3, clause 1, that when a person claiming land or rent, or his predecessor in title, shall, in respect of the estate or interest claimed, have been in possession of such land or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, his right to make an entry or distress, or to bring an action to recover the land or rent, shall be deemed to have accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such rent was received. The Act also provides for the case of receipt of profits of the land; that is, not the receipt of rent from a

Two
events
provided
for.

R.P.L.
Act, 1833,
s. 3,
clause 1.

tenant, but the receipt of the actual proceeds from a bailiff (see Lord St. Leonards' R. P. St., 47) ; but considering that the possession of the bailiff is the possession of the employer this was perhaps unnecessary. Omitting further reference to the case, it is sufficient to say that upon the clear construction of the clause the statute runs, in the case of land, from dispossession or discontinuance of possession; in the case of rent, from the last receipt. (*Owen v. De Beauvoir*, 1847, 16 M. & W. p. 564; 5 Ex. p. 178.)

A.—Dispossession and Discontinuance of Possession of Land.

Distinction
between
dispossession
and
discontinuance
of possession.

In considering the distinction, for the purposes of the statute, between dispossession and discontinuance of possession of land, it will be convenient to revert to what has been already said as to the distinction between actual and civil possession. In general the two coincide, and when, this being the case, a stranger enters and takes possession, we have a clear case of dispossession. It is a dispossession both in fact and in law. The actual possession of A., the old possessor, is replaced by the actual possession of B., the intruder, and at the same time, or at any rate shortly afterwards, A.'s civil possession also comes to an end. But the civil possession of A. does not depend on his continuance in actual possession. He may discontinue the actual possession—that is, he may cease to be the ostensible possessor—and yet, provided his possession was founded on title, the civil possession will remain in him. In such a case there is no reason why time should run against him, and it is clear that it does not. There must further be an entry by a stranger, B., with the result that the civil possession is terminated. If in the statute the term “dispossession” was used to indicate civil dispossession, it would be wide enough to include both these cases; but in

fact it is confined to actual dispossession, and the termination by the entry of a stranger of a possession which is merely a civil possession is regarded as a "discontinuance of possession." "In my view," said Fry, J., in *Rains v. Burton* (1880, 14 Ch. D. p. 539), "the difference between dispossession and the discontinuance of possession may be expressed in this way—the one is where a person comes in and drives out the others from possession; the other case is where the person in possession goes out, and is followed into possession by other persons." Perhaps it is not quite correct to speak of dispossession as requiring the driving out of a possessor actually present on the land. Entry during the temporary absence of the possessor is a dispossession rather than a discontinuance of possession; but otherwise the passage appears correctly to state the law.

As to dispossession it is easy, when once it is understood that actual and not civil dispossession is in question, to limit the term to cases where the actual possession of A. is terminated by the adverse entry of B.; but that A.'s voluntary withdrawal from actual possession is not a discontinuance of possession within the statute until B. has entered is not so clear. An adherence to the literal meaning of the phrase would make time run from the moment of withdrawal, but until some other person has entered there is no one against whom A. could enforce his right of entry, or in favour of whom the statute can operate, and on these grounds it has been held that actual possession by a stranger is necessary to complete the discontinuance of possession. "The word 'discontinuance'," said Blackburne, C. J., in *M'Donnell v. M'Kinty* (1847, 10 Ir. L. R. p. 526), "I understand to mean an abandonment of possession by one person, followed by the actual possession of another person. This, I think, must be its meaning; for if no one succeed to the possession vacated or abandoned, there could be no one in

Discontin-
uance
of pos-
session.

whose favour or for whose protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected." And this opinion was emphatically indorsed by the English Court of Exchequer in *Smith v. Lloyd* (1854, 9 Ex. 562), where Parke, B., in delivering the judgment of the Court, said, "We are clearly of opinion that that statute [3 & 4 Will. 4, c. 27] applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C. J., in *M'Donnell v. M'Kinty*, and the principle upon which it is founded." In *Trustees' Agency Co. v. Short* (1888, 13 App. Cas. p. 799) these cases were treated by the Privy Council as correctly stating the law.

Abandon-
ment of
possession.

In *Doe v. Bramston* (1835, 3 A. & E. 63), where it was held that there was evidence of an intention to abandon possession altogether, the natural construction of the statute was adopted, and time ran at once against the person entitled, irrespective of the actual entry of any other person. A *feme sole* who was seised in fee of land married, and subsequently she and her husband left the land and went to reside at a distance from it. They never returned, and, apparently, no act of ownership was afterwards done by them. After the wife's death an action to recover the land was brought by her heir-at-law against the person then in possession. The precise time at which the land had been abandoned was not shown, but it was more than forty years before the commencement of the action. It was held that time ran from the abandonment, and that the period

of forty years was an absolute bar under sect. 17 of the Act of 1833. "The departure of the former possessors to a distance," said Lord Denman, C. J., "without appearing to have received any rent or made any demand, is the strongest evidence of their intending to abandon at once all occupation and all claim of ownership." Nothing was said as to the date when the adverse possession commenced, and it is possible that different rules might prevail in the case of deliberate abandonment of possession, and in the case of mere withdrawal from occupation. The former probably terminates the civil possession; the latter ordinarily terminates only the actual possession, leaving the civil possession intact. But the principle of the decisions quoted above seems to apply to all cases where actual possession is given up, whatever may be the intention of the possessor as to returning, and it seems correct to say that abandonment is ineffectual to set time running until there is also a fresh possession in favour of which it can run.

Actual possession is maintained by the exercise of acts of ownership over the land, and these may be acts of beneficial user, as the cultivation of the land, or acts of exclusion, as the maintenance of fences and barriers. When upon this actual possession a stranger enters and establishes possession on his own account, there is a dispossession. But the acts of ownership need not be continuous, nor need they be in all cases even frequent. Regard must be had to the character of the land and the purposes for which the possessor wishes to use it, and his actual possession is maintained by the doing of such acts as, under the circumstances, might be expected. On the other hand, while the existing actual possession is easily held to be preserved, an adverse possession must be marked by definite acts of occupation. Where, therefore, the possessor continues to

Cases of
dispossession.

act as owner of the land, or where a stranger enters and gains an exclusive possession, there is no room for doubt. In the first case there is not, and in the second case there is, a dispossession. The difficulty arises where, on the one hand, the possessor is manifesting his possession only by slight acts of ownership, while on the other the establishment of a fresh possession is not clearly shown. The following cases show when a dispossession may, under such circumstances, be said to have taken place.

Tottenham
v. Byrne.

In *Tottenham v. Byrne* (1861, 12 Ir. C. L. R. 376), B. was the owner of land on each side of a public road, the soil and freehold of which had been reserved on the grant of the land, and were vested in A. The road was at first used as a carriage road, but B. built a wall across it, leaving a stile for foot passengers, by whom it was thenceforth used. The evidence as to the date when the wall was built was conflicting, the evidence for A. putting it in 1843, that for B. in 1839. B. also levelled the fence on each side of the road, so as to throw the site of the road apparently into his own land. The question was whether this was a dispossession of A. by B. The majority of the Court held that it was. For pulling down the boundary walls and enclosing the road, it was pointed out that A. could have sued in ejectment, and as this was a remedy intended to restore possession there must have been a dispossession. This, however, seems to beg the question. Pigot, C. B., took a different view. The erection of the wall by B. had not stopped the user of the road by the public, including tenants of A., who used it for fetching water from a well, and hence it had been actually used in the manner contemplated when the soil of the road was reserved. "The exception," said the Chief Baron, "being of land described as a road, what was contemplated by both parties (by the grantee of the soil, and the grantor

who excepted it) was the use of the road *as such*; and so long as the road was used by the tenants of the grantor, or by the public, there was a use and enjoyment, *quoad hoc*, which, in my opinion, preserved the title in the grantor, and in those deriving under him, and which prevented the operation of the 2nd and 3rd and 34th sections of the Statute of Limitations, 3 & 4 Will. 4, c. 27." Probably the judgment of Pigot, C. B., was correct.

In *Leigh v. Jack* (1879, 5 Ex. D. 264) the soil of an intended street, and the land on either side of it, belonged originally to L., the plaintiff's predecessor in title. In 1854 L. conveyed to the defendant a plot of land on the south side of the street, upon which he built a factory. A conveyance of land upon the north side was made in 1857, and in 1872 this also became vested in the defendant. The street was never dedicated to the public as a highway, and from 1854 the defendant had placed upon it materials used at his factory, so as to block it up except as against foot passengers. In 1865 he enclosed an oblong portion of it, and in 1872 he fenced in the ends. Previously to this the site of the intended street had been separated from another street, into which it led, by a fence consisting of posts and a swing rail; and this fence was repaired and renewed within twenty years of the action both by L. and by the defendant. The action was brought by the tenant for life under L.'s will to recover possession of the site of the intended street. The Court of Appeal (Cockburn, C.J., Bramwell and Cotton, L.JJ.) held that there had been no discontinuance of possession on the part of L. or the plaintiff, and it had to be determined, therefore, whether there had been a dispossession. It was held that there had not. Cockburn, C.J., and Bramwell, L.J., relied upon the acts of user by the defendant being of a merely temporary kind, and not inconsistent with the owner's enjoyment

of the soil for the purpose for which it was intended. Cockburn, C.J., said:—"I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right." And Bramwell, L.J.:—"I do not think that there was any dispossession of the plaintiff by the acts of the defendant. Acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it."

This again, therefore, was a case where, under the actual circumstances, the possessor could not be expected to exercise substantial acts of ownership, and where the person claiming to have dispossessed him was bound to show a clear occupation. In favour of the plaintiff, too, there was the circumstance of the repair of the fence by L. within the twenty years. There was thus some slight evidence of his actual possession, and no conclusive evidence, so the Court held, of an adverse occupation by the defendant. The action was commenced in 1876, and the adverse occupation should have dated, therefore, from 1856.

*Searby v.
Tottenham
Rail. Co.*

In *Searby v. Tottenham Railway Co.* (1868, L. R. 5 Eq. 409), a public road had been constructed by trustees under the powers of an Act of Parliament. They separated it from an adjoining field by a hedge and a bank, and on the field side of these—but upon land belonging to themselves—they made a ditch three feet wide. The case related to the site of the ditch. The evidence showed that in course of time it had become filled up and obliterated, and had never been re-opened by the trustees. The owners of the field had always included the hedge in their leases,

and the tenants had used the strip within the hedge as part of their field for much more than twenty years, and at their own expense had trimmed the hedge on both sides. During the same time the trustees had not interfered in any way with the site of the ditch. In spite of all this, Page Wood, V.-C., held that no act adverse to the trustees had been done. The occasional clipping of the hedge was no such act, nor was the circumstance of cattle wandering over the site of the ditch, after it had been filled up, sufficient to raise the statute against the trustees. It was very little that they, as the actual possessors, could do to the land, and the adjoining owners had not definitely appropriated it either by inclosure or by clear acts of ownership.

A different result was arrived at in *Norton v. London and North Western Railway Co.* (1879, 13 Ch. D. 268). *Norton v. L. & N. W. Rail. Co.* The company had taken land, and had fenced it off from the adjoining land by a post and rail fence. Inside this, on their own land, they planted a quick hedge, leaving between the hedge and the fence a strip of land 4 ft. 6 ins. wide. As the hedge grew up, the fence was allowed to fall into decay, and about the year 1846 it was removed by the occupier of the adjoining land. From the year 1854 until the commencement of the action in 1875 the strip of land was occupied and cultivated with the remainder of the field in which it lay, partly as arable land and partly as garden ground. The railway company in no way interfered with it except that their workmen went upon it to trim the hedge. The Court of Appeal held that there was a complete case of possession by the owner of the field sufficient to extinguish the title of the company. The actual cultivation of the land distinguishes this from the preceding cases.

The question of continuance of possession of a boundary Possession of boundary wall.

wall has several times been discussed. In *Phillipson v. Gibbon* (1871, L. R. 6 Ch. 428) the wall formed one side of a house and fronted on a street. It contained a stone with an inscription dated in 1766, stating that the wall had been built by and belonged to the East India Company, who had thrown the adjoining ground into the street. It was held that this was enough to save the possession of the company. "Where," said James, L.J., "there is a boundary wall, and that boundary wall remains undisturbed, and an inscription is allowed to remain on it which states to all the world that it is the boundary wall of the adjoining proprietor, it seems to us idle to suppose that any question of the Statute of Limitations, or of adverse possession, or of cesser of possession, could properly arise." In *Stedman v. Smith* (1857, 8 E. & B. 1), on the other hand, it was held that dispossession had been effected. The plaintiff and defendant occupied adjacent plots of ground, divided by a wall, of which they were tenants in common. There was a shed in the defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. The defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a washhouse contiguous to the wall, where the shed had stood, the roof of the washhouse occupying the whole width of the top of the wall; and he let a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him. It was held that there was evidence of actual ouster such as would sustain an action of trespass by one tenant in common against another, and apparently too, there was a dispossession such as to make time run under the statute. But where A. and B. were the owners of two adjoining houses, and A. for the purpose of raising his house built upon the wall, belonging to B., of B.'s

house, it was held that this was at the utmost a case of easement, that the additional wall belonged, immediately on the building of it, to B., and that as A. had not subsequently done any act to put himself in exclusive possession, he had not gained a title to the wall against B. (*Waddington v. Naylor*, 1889, 60 L. T. 480.)

Actual possession, as stated above (*ante*, p. 59), continues so long as acts of ownership are from time to time done, or so long as the land retains visible signs of occupation; and if, while possession is thus maintained, a stranger enters and gains possession for himself, this is a case of dispossession. A discontinuance of possession requires as its first element, that these marks of occupation should cease, and as its second element, that actual possession should be obtained by a stranger. It is thus immaterial whether the civil possession does or does not continue; ordinarily it does, but it may be terminated by an intention to put an end to it. We then have an abandonment of possession. But whether there is simply a cessation of user, or an absolute abandonment of possession, in either case the statute only runs from the time when possession is taken by a stranger. This view of the nature of discontinuance of possession is illustrated by the judgment of Bramwell, L.J., in *Leigh v. Jack* (1879, 5 Ex. D. at p. 272):—"Two things appear to be contemplated by [sect. 3 of the Act of 1883], dispossession and discontinuance of possession. It is difficult to suppose a case where it can be doubtful whether there has been a discontinuance of possession as to a house; if any chair or table, or other small article of furniture be left, there is strong evidence of intention that there shall be no discontinuance of possession; but it is possible to conceive a case of discontinuance of possession as to a piece of land where the former owner does nothing to it for the space of twenty years.

Cases of
discon-
tinuance
of posses-
sion.

. . . But, after all, it is a question of fact, and the smallest act would be sufficient to show that there was no discontinuance." The reference to twenty years is, perhaps, misleading. It does not require a withdrawal from occupation for that length of time to constitute a discontinuance of possession. Regard must be paid to the use to which the premises are being put, and, when there has been continuous user, a sudden cessation of that user may well be treated as a discontinuance of possession. It is sufficient to say that there is no discontinuance, so long as the state of actual possession is maintained by acts of ownership or other outward marks of possession. Where possession is delivered to the grantee under a grant which is void for non-compliance with the provisions of the Mortmain Act, there is a discontinuance of possession by the grantor, and the statute forthwith runs against him. (*Churcher v. Martin*, 1889, 42 Ch. D. 312.)

Discontin-
uance
of posses-
sion of
mines.

Cases of discontinuance of possession are rare with respect to the surface of land; they chiefly occur in regard to mines and quarries which the owner has no present desire to work. The mere omission to work is no evidence of the abandonment of the right to work (*Seaman v. Vawdrey*, 1809, 16 Ves. 390; *Adair v. Shaftoe*, referred to in 19 Ves. p. 156), but this consideration is not at present material. For the statute to operate it is assumed that the right continues. Under sect. 34 of the R. P. L. A., 1833, it is liable to be extinguished at the end of a definite period of time, such period being reckoned not from the cessation of user, but from the entry of a stranger. The judgments to this effect in *M'Donnell v. M'Kinty* and *Smith v. Lloyd* have been quoted above (*ante*, pp. 195, 196).

Effective
entry.

Since, whether there has been a dispossession or a discontinuance of possession, there must in either case be an actual possession by a stranger in favour of which time

can run, it does not seem to be of any practical importance to distinguish which event has happened. The point to be considered is, whether a new possession has been gained ; and since this is an adverse possession, it is subject to the rule that an effective occupation must be obtained of the whole of the property over which it is claimed that the new possession extends. In *Smith v. Stocks* (1869, 17 W. R. 1135) a gravel pit had in 1804 been allotted by Inclosure Commissioners to the surveyors of highways. The surveyors had at first got gravel from the pit, but in 1837 they ceased to do this and procured gravel elsewhere. The pit was then filled up and taken into cultivation by the tenants of the owner of the adjoining land, and it remained in their occupation for over twenty years. This, it was held, was an actual possession on behalf of the adjoining owner which had extinguished the title of the surveyors. Here there was an actual possession of the whole of the property ; but where this is not the case, user and possession of part will not justify the presumption of possession of the whole. In *M'Donnell v. M'Kinty* (1847, 10 Ir. L. R. 514) a grant of lands was made in 1738 with a reservation to the grantor of mines, minerals, and quarries. From that time until the date of the action the grantor and his successors in title did not make any claim to, or work, or use the quarries ; but it appeared that persons claiming under the grantee had opened and worked quarries in some places, and had ground limestone and burnt it for the use of their lands. It was held that this partial user of the quarries did not confer possession of the whole, so as to extinguish the title under the reservation. "Such a presumption of law," said Blackburne, C.J., "is never made but in favour of right."

This refusal of the law, in the absence of title, to raise from possession of part of land a presumption of possession

Effective
possession
of mines.

of the whole makes it difficult to gain a title to mines under the statute, and in general a stranger only acquires possession of the coal he actually severs (*E. of Dartmouth v. Spittle*, 1871, 19 W. R. 444); but it may be possible for him, by sufficiently marking out the area of his occupation, to acquire possession of an entire seam. "I can well understand," said Hall, V.-C., in *Ashton v. Stock* (1877, 6 Ch. D. 719), "that there might be cases in which, from the manner of working coal, a person who began to work it, and was a mere wrongdoer and trespasser, might have acquired a title to a certain seam or area of coal, and that, by the mode of driving the levels and opening a certain area of coal, there might have been possession acquired to the whole thing as a mine, or as a seam of coal, and not merely to the particular quantity of coal that was actually hewn and gotten."

Secret
dispos-
session.

This, however, was merely a suggestion. It was not the case before Hall, V.-C., and, as he added, it was not for him to say more than that such a case might exist. It is obvious that the doctrine might result in great hardship to mine owners. An owner may find himself deprived of his property, although he has been without knowledge of the intrusion and has had no possible means of obtaining such knowledge. In other cases ignorance on the part of an owner, whether of his right (*Dawkins v. Lord Penrhyn*, 1877, 6 Ch. D. p. 324), or of the infringement of his right (*Rains v. Burton*, 1880, 14 Ch. D. p. 540), does not prevent the operation of the statute; and it may be difficult on the strict construction of the Acts to distinguish between mines and other property. It must be remembered, however, that the Courts have shown a tendency not to press the strict construction where it would work injustice (cf. *Trustees' Agency Co. v. Short*, 1888, 13 App. Cas. 799), and it is possible that the statute might not be

held to run upon a secret dispossession of mines. At any rate, it is clear from the judgments of Kelly, C. B., and Pigott, B., in *E. of Dartmouth v. Spittle* (*supra*), that as little effect as possible would be given under such circumstances to acts of adverse user. Trespasses committed underground and without the knowledge of the owner of the property "have not the same legal effect as an adverse possession of the surface" (19 W. R. p. 445).

On the other hand, the presumption in favour of possession will be made where the possessor, although in consequence of a defect in the conveyance he obtains no title, yet enters into possession with the consent of the previous possessor. In such a case his entry on part of the mine will give him possession of all which his predecessor held. In *Low Moor Co. v. Stanley Coal Co.* (1876, 34 L. T. 186), certain lands were vested in D. By an indenture of 12th July, 1834, he granted, bargained, and sold all the minerals lying under the lands to H. The indenture was not enrolled as a bargain and sale, and there was no livery of seisin to make it operate as a feoffment. There were seven seams of coal and minerals lying under the lands, and soon after the execution of the indenture H. began to work and get the coal, and continued to do so between 1834 and 1844. He did not, however, go below the first two seams of coal, and, on his ceasing to work in 1844, he left tramways and implements in the tunnels and levels he had made, so that he could, if he chose, have resumed working at any time. In 1855, H. by deed conveyed the minerals (except the two first or upper seams) to the plaintiffs, who shortly after entered, and bored down below the two first seams, in order to try for coal, but they did not work the coal. In 1872 the defendants entered and worked the coal in the lower seams, claiming through D. all the seams and beds of coal under

the lands, subject to such right or interest as legally passed to H. under the indenture of 12th July, 1834. It was held, in trespass brought by the plaintiffs, that H., by entering under the deed of 1834, had obtained possession of the whole of the seams as tenant at will to D., and, the statute running from the end of the first year, his title was complete in 1855. "It is true," said Cairns, L. C., "that in cases where a man has entered upon and taken possession of one seam of coal, and by lapse of time has acquired some title to it, the law will not assume that his possession extends to all the other seams of coal lying under that particular one; but in the case we have before us it was beyond all doubt intended that Holroyd should have possession, and take possession of all the seams." This is in accordance with what has been said above as to change of possession with the consent of the existing possessor (*ante*, p. 35.)

*Keyse v.
Powell.*

The question of the possession of mines is further illustrated by the case of *Keyse v. Powell* (1853, 2 E. & B. 132). Branthwaite was tenant from year to year of copyhold lands beneath which was an unopened coal mine. Being thus in possession of the lands, and the mines not having been reserved, he was in possession of the latter also, and, though he could not work them, his possession would have been sufficient to maintain trespass. (*Lewis v. Branthwaite*, 1831, 2 B. & Ad. 437.) In 1821, during the existence of Branthwaite's tenancy, the copyholder granted the mine to Branthwaite and Prothero for a term of 99 years, but no entry was made under the demise. In 1832 Branthwaite's tenancy from year to year came to an end, and the surface of the land was delivered up to the copyholder. In 1847 the assignee of the term granted to Branthwaite and Prothero entered and worked the mine, and the copyholder thereupon brought trespass. The

assignee pleaded that the copyholder was not possessed, and also that he himself had a right of entry under the lease. To the right of entry the copyholder replied the statute. The copyholder would have succeeded on both pleas could he have shown that no possession of the mine had ever been held under the term of 99 years. In that case no severance would have taken place between the possession of the surface and the possession of the mine; the possession of both, therefore, would have vested in the copyholder when the surface was given up to him on the determination of Branthwaite's tenancy from year to year; and he would thus have been possessed at the time of the alleged trespass. Moreover, on the same supposition, the right of entry under the term would have accrued in 1821, and would have been barred by the lapse of twenty years. But it was decided that possession had been held under the term. Branthwaite's possession in 1821, as tenant from year to year, when the lease was granted, enured for the benefit of himself and Prothero. Hence they were immediately in possession under the lease, and this possession certainly continued until the termination of Branthwaite's tenancy of the surface in 1832. At this time it would seem that there was a severance between the possession of the surface and the mine, so that, although the copyholder obtained possession of the surface, yet the possession of the mine continued to follow the term, and, with respect to the plea of not possessed, the Court took this view. Consequently the assignee of the lease, and not the copyholder, was in possession when the mine was first worked. But admitting, as was done for the purpose of the statute, that the possession of the mine did vest in the copyholder in 1832, and that the lessees were then dispossessed, this, and not 1821, was the date when their right of entry accrued, and they were therefore not barred.

B.—*Discontinuance of Receipt of Rent.*

Statute
runs from
last
receipt.

In the case of rent the statute runs, not from the date when the right to the rent is in fact violated by an omission to pay on the part of the person liable, but from the last receipt of rent, so that, in the case of rent payable annually, the period of limitation is in practice reduced from twelve to eleven years. This result necessarily follows from the language of the statute. (R. P. L. A., 1833, s. 3; *Owen v. De Beauvoir*, 1847, 16 M. & W. 547.) In *Adnam v. Earl of Sandwich* (1877, 2 Q. B. D. 485) it was thought that the statute would not run unless there was a negligent omission to enforce his rights on the part of the person entitled; it would not run, therefore, if he was ignorant of his rights. But the statute is founded on the fact of discontinuance of receipt, not on the state of mind of the person entitled (*ante*, p. 206), and the correctness of the decision in *Adnam v. Earl of Sandwich* may be doubted.

(2.) *Failure to take Possession.*

Right
accruing
on death
or con-
veyance.

The second and third clauses of sect. 3 of the Act of 1833 provide for the cases where a person becomes entitled either upon the death of his predecessor in title, such predecessor remaining in possession up to the time of his death, or upon a conveyance *inter vivos*, and fails to take possession. In the first case his right is deemed to accrue at the time of the death; in the second case, at the time when he becomes entitled to possession under the instrument of conveyance. The clauses require that the predecessor shall have been in possession in respect of the same estate or interest as that which the successor claims, and hence it has been doubted whether they apply in the case of derivative interests carved by will or deed out of a

greater interest. If they do not apply, claims in respect of such derivative interests are governed by the general provision of sect. 1 of the Act of 1874. (*James v. Salter*, 1837, 3 Bing. N. C. 544; *Magdalen Hospital v. Knotts*, 1878, 8 Ch. D. p. 727; *Pugh v. Heath*, 1882, 7 App. Cas. p. 238.) In the case of devolution upon death, the statute expressly provides that the right shall be deemed to accrue on the death; but to make the statute run at once, although no stranger enters, is contrary to the principle that there must be a possession in favour of which it can run. (*Ante*, p. 184.) The point appears to be undecided. (Cf. *Hayes' Conveyancing*, I. 248.)

2. FUTURE INTERESTS.

The right of entry or action in respect of a future estate or interest is not deemed to accrue, and the statute, therefore, does not run, until the estate or interest falls into possession. (R. P. L. A., 1833, s. 3, clause 4; R. P. L. A., 1874, s. 2.) Where, therefore, a life tenant aliens in fee, time does not run against the remainderman until the death of the tenant for life. (*Doe v. Rolfe*, 1838, 8 A. & E. 650.) Other instances of the operation of the rule are afforded by *Jumpsen v. Pitchers* (1843, 13 Sim. 327); *Doe v. Liversedge* (1843, 11 M. & W. 517); and *Hugill v. Wilkinson* (1888, 38 Ch. D. 480.) But where the owner of the preceding particular estate has been out of possession, the remainderman has the longer of two alternative periods, either twelve years from the time of the accrual of a right of entry or of action to the owner of the particular estate, or six years from the time when his own estate becomes vested in possession. (R. P. L. A., 1874, s. 2, clause 2.) But the clause does not operate when the owner of the particular estate is out of possession in con-

Statute runs when interest falls into possession.

sequence of having made a grant of the land in fee. (*Pedder v. Hunt*, 1887, 18 Q. B. D. 565.)

Settlement
while
statute is
running.

An owner entitled in possession, against whom the statute is already running, cannot by settling the land postpone the operation of the statute as to persons taking future interests under the settlement. They claim through the settlor, and when his original right is barred they are barred also. (*Stackpoole v. Stackpoole*, 1843, 4 Dr. & War. p. 347; *Doe v. Moore*, 1846, 9 Q. B. 555.) In the case of a re-settlement by a remainderman, while the statute is running against the owner of the particular estate, there was, on the Act of 1833, some doubt. But in *Doe v. Edmonds* (1840, 6 M. & W. 295) it was held that claimants under such a re-settlement were allowed only the time which the remainderman himself would have had, and a provision, apparently to this effect, is contained in the Act of 1874 (sect. 2, clause 3).

Determina-
tion of
the par-
ticular
estate.

The future estate falls into possession, and the statute begins to run, on the determination of the previous estate, in respect of which the land has been held. (R. P. L. A., 1874, s. 2.) In general the date of the determination of the particular estate affords no difficulty, but special considerations arise upon the cases of determination by forfeiture and by the operation of the statute. Where an estate has been, or is liable to be, determined by forfeiture or breach of condition, the statute *prima facie* runs from the date of the forfeiture or breach (R. P. L. A., 1833, s. 3, clause 5); but if advantage is not taken of the forfeiture or breach it does not run till the estate in remainder falls into possession in the ordinary course. (Sect. 4; cf. *Astley v. Earl of Essex*, 1874, L. R. 18 Eq. 290.) Where the previous estate is extinguished by the operation of the statute, it appears to be doubtful whether the remainder is thereby accelerated so that a right of entry accrues to the

remainderman, and the statute runs against him. (See Hayes' Conveyancing, I. 269; 11 Jur. N. S., Part II., p. 151; 34 Sol. Journ. p. 691.) Probably it would not be deemed to have determined for all purposes, but to be in effect transferred to the stranger in whose favour time has been running. In other words, he gains a possessory estate *pur autre vie*.

Of the successive estates into which the fee is divided, two or more may belong to the same person, and this event is provided for by the Acts. Sect. 5 of the Act of 1833 provided that the right in respect of a future estate should not be prejudiced by a possession of the owner of the future estate prior to its creation. It is not at all clear that this provision was necessary (cf. Hayes' Conveyancing, I. p. 255; Lord St. Leonards, Real Property St. p. 51; Smith's L. C. 9th ed. II. 748); but it was re-enacted without material alteration by the Act of 1874 (sect. 2, clause 1). More intelligible is the case where the owner of the particular estate, against whom time is running, is owner also of a future estate; if, for example, there is a life estate to A., who has been dispossessed, remainder to B. for life, remainder to A. in fee. In such a case a bar to the first estate of A. is a bar to the subsequent estate also, unless in the meantime possession of the land has been recovered in respect of B.'s intermediate estate. (R. P. L. A. 1833, s. 20; *Doe v. Mouldsdale*, 1847, 16 M. & W. 689; *Clarke v. Clarke*, 1868, 1 R. 2 C. L. 395; and as to "recovered," see *Doe v. Liversedge*, 1843, 11 M. & W. 517.)

Successive estates in the same person.

The reversion upon a term of years is, so far as the right to possession of the land is concerned, a future interest, and the statute does not begin to run against the reversioner until the reversion falls into possession by the expiration of the term. This general rule is subject to

Reversions upon terms of years.

the special provision of sect. 9 of the Act of 1833 in the case of adverse receipt of rent. But a term created by way of trust for raising money stands upon a different footing. Until it is enforced and possession taken under it, the person in whom the land is vested subject to the term is entitled to possession, and, if he fails to enter, the statute runs against him. (*Humble v. Humble*, 1857, 24 Beav. 535; *Re Bermingham's Estate*, 1870, 5 Ir. R. Eq. 147; *Twaddle v. Murphy*, 1881, 8 L. R. Ir. 123.)

Estates
tail.

In considering the effect of the statute on land subject to an estate tail, we have to deal with the issue in tail and the remainders expectant on the estate tail. Sect. 21 of the Act of 1833 enacts that when the statute has run against a tenant in tail, it is to be taken to have run also against any estate, interest, or right which he might lawfully have barred, and sect. 22 provides that this result shall not be prevented by the death of the tenant in tail before the bar of the statute is complete; but that, if time has commenced to run against him, it shall continue to run against claimants to any estate, interest, or right which he might have barred.

Operation
of statute
against
issue in
tail.

These sections are clearly wide enough to bar both the issue in tail and subsequent remaindermen; and it was formerly thought that they applied to both these classes. (*Rimington v. Cannon*, 1852, 12 C. B. p. 34; *Austin v. Llewellyn*, 1853, 9 Ex. 276.) But, in fact, the issue "claim through" the tenant in tail within the meaning of the definition clause (sect. 1 of the Act of 1833), and consequently, under sect. 1 of the Act of 1874, the statute runs against them as well as against the tenant in tail; hence this case being already provided for, sects. 21 and 22 apply only to estates in reversion or remainder subsequent to the estate tail. (*Earl of Abergavenny v. Brace*, 1872, L. R. 7 Ex. 145.) If, however, the tenant

for life has so acted as to part with the right to possession during his life, the estate of the issue becomes an independent future estate, and the statute does not run against them until such estate falls into possession. (*Cannon v. Rimington*, 1852, 12 C. B. 1.)

The effect of sects. 21 and 22 is to place the remaindermen, like the issue, in the position of claimants under the tenant in tail (*Goodall v. Skerratt*, 1854, 3 Drew. 216); in other words, the whole series of limitations forms, for the purpose of the statute, one unbroken estate, and when the statute runs against the tenant in tail, it runs equally against the issue in tail, as persons claiming through him, and against the remaindermen, as persons claiming estates which he might have barred.

Operation
of statute
against
remain-
dermen.

There is also the case where the tenant in tail has executed a conveyance barring his issue, but, for failure to obtain the consent of the protector of the settlement (*Anderson v. Anderson*, 1861, 30 Beav. 209), it does not bar the remainders. This is provided for by sect. 6 of the Act of 1874, replacing sect. 23 of that of 1833 (*Penny v. Allen*, 1857, 7 D. M. & G. 409; *Morgan v. Morgan*, 1870, L. R. 10 Eq. 99), and time will run against the remainders, and in favour of the person entitled under the defective assurance, from the date when the assurance, if then executed by the tenant in tail, would have been effectual to bar the remainders without the consent of any other person. But if the tenant in tail has a prior life interest, the possession of a purchaser from him may be referred to such life interest, and he will then not gain the benefit of sect. 6. (*Mills v. Capel*, 1875, L. R. 20 Eq. 692.)

Possession
under a
base fee.

3. TRUSTEE AND CESTUI QUE TRUST.

Where the ownership of land is divided between persons who take rights differing in their nature, the question of

Division
of subject.

the operation of the statute arises in various forms. For the case of division of ownership into legal and beneficial estates we have to consider its operation in favour of the trustee against the *cestui que trust*; in favour of the *cestui que trust* against the trustee; in favour of a stranger as against the trustee or the *cestui que trust*, or both; and in favour of one *cestui que trust* against the rest.

(1.) *In Favour of the Trustee against the Cestui que Trust.*

Distinction
between
express
and con-
structive
trusts.

Previously to the Act of 1833 it was settled that, when a trustee was in possession, his possession was to be regarded as the possession of the *cestui que trust*, and the length of time during which the trustee omitted to discharge the trust was no bar to the *cestui que trust's* claim against him. (*Horenden v. Lord Annesley*, 1806, 2 Sch. & Lef. p. 633; *Chalmer v. Bradley*, 1819, 1 Jac. & W. p. 67.) But a distinction was made between express trusts, declared by the parties, and constructive trusts, arising from circumstances or the acts of the parties; and claims in respect of trusts of the latter kind were liable to be barred. (*Townsend v. Townsend*, 1783, 1 Bro. C. C. p. 554; *Beekford v. Wade*, 1805, 17 Ves. p. 95.) This distinction is preserved by sect. 25 of the Real Property Limitation Act, 1833 (cf. Judicature Act, 1873, sect. 25 (2)), and time cannot run in favour of a trustee in whom land is vested on an express trust, though it may run in favour of a purchaser from the trustee for valuable consideration (*Law v. Bagwell*, 1843, 4 Dr. & War. p. 408), notwithstanding that he has notice of the trust. (*Att.-Gen. v. Magdalen Coll.*, 1857, 6 H. L. C. p. 216.) In such a case it runs from the date of the conveyance. And the trustee is not assisted in gaining a title to the land by sect. 8 of the Trustee Act, 1888, since this only applies where a trustee no longer holds the trust property. On the other hand, all trusts which cannot be described as

express trusts fall within sect. 24 of the Act of 1833, and are liable to be barred. (*Att.-Gen. v. Flint*, 1844, 4 Hare, p. 155.)

This distinction between express trusts and constructive trusts makes it necessary to determine with precision what is to be understood by the term "express trust." To constitute an express trust there must be a trust "expressly declared by a deed, or a will, or some other written instrument" (per Kindersley, V.-C., in *Petre v. Petre*, 1852, 1 Drew. p. 393), and though, as to personalty, it may not be necessary that the trust should be in writing (*Sands to Thompson*, 1883, 22 Ch. D. 614), the definition seems to be accurate in the case of land. (Cf. Statute of Frauds, s. 7.) So in *Cunningham v. Foot* (1878, 3 App. Cas. p. 984), Lord Cairns, C., said that by an express trust he understood the Legislature to mean "a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience; a trust arising upon the words of the instrument itself." (Cf. *Dickinson v. Teasdale*, 1862, 1 D. J. & S. p. 59; *Sands to Thompson*, *supra*.)

Express trusts.

Trusts which are not express, and which are liable, therefore, to be barred, are included under the terms "constructive," "implied," and "resulting," but as to resulting trusts there is an important distinction. Where the resulting trust arises solely by operation of law, as where upon a purchase of land a trust results in favour of the person who pays the purchase-money, although the conveyance is made to another, clearly there is no express trust. The term "resulting trust," however, is also used where the trust itself, the separation of the beneficial from the legal ownership, has been created by a written instrument, but through failure in the objects of the trust the beneficial interest results to an heir or other person ascer-

Resulting trust may be express or constructive.

tained by rules of law. In such a case the law points out the beneficial owner, but it does not create the trust, and the trust is still regarded as express. (*Salter v. Cavanagh*, 1838, 1 Dr. & Wal. 668; *Patrick v. Simpson*, 1889, 24 Q. B. D. 128; but see per Kekewich, J., in *Churcher v. Martin*, 1889, 42 Ch. D. p. 319.)

Trustee *de son tort*.

And it appears that a person who undertakes to act in an express trust without being appointed as trustee may make himself liable as an express trustee (*Life Association of Scotland v. Siddall*, 1861, 3 D. F. & J. 58), though it is, perhaps, safer to put this result on the ground of estoppel. (*Lyell v. Kennedy*, 1889, 14 App. Cas. p. 459.)

Charities.

Previously to the Act of 1833 a charity was not barred "by length of time or any Statute of Limitations" (*Att.-Gen. v. Mayor of Coventry*, 1700, 2 Vern. p. 399; *Magdalen Coll. v. Att.-Gen.*, 1857, 6 H. L. C. p. 207), though length of time might be important in determining the effect and construction of an instrument (*Att.-Gen. v. Mayor of Bristol*, 1820, 2 Jac. & W. p. 321), or in determining whether an existing state of circumstances should be interfered with. (*Att.-Gen. v. Hungerford*, 1834, 2 Cl. & Fin. p. 378.) But the Act of 1833 has no saving in favour of charities, and they are barred like other equities unless preserved by express trust. (*Commissioners of Donations v. Wybrants*, 1845, 2 Jo. & Lat. 182; *Magdalen Coll. v. Att.-Gen.*, *supra*; *Magdalen Hospital v. Knotts*, 1879, 4 App. Cas. 324.)

(2.) *In Favour of the Cestui que Trust against the Trustee.*

Former law.

In general the *cestui que trust* under a simple trust (Lewin on Trusts, 9th edit. 758) is entitled to the actual possession of the trust estate, and the trustee is not allowed to deprive him of it. (*Cholmondeley v. Clinton*, 1817, 2 Mer. p. 359.) And this possession is accounted for at law

by describing the *cestui que trust* as tenant at will to the trustee. (*Freeman v. Barnes*, 1671, 1 Ventr. 80; 1 Sider. 349, 458.) The tenancy supports the seisin of the trustee (*Parker v. Carter*, 1844, 4 Hare, 400), and it follows that the possession, while held under such tenancy, is not adverse to the trustee. (*Kecne v. Deardon*, 1807, 8 East, 248; *Smith v. King*, 1812, 16 East, 283.) But the *cestui que trust* could prevent a tenancy, and exclude the seisin of the trustee, by repudiating the title of the latter from the beginning of his possession; and, though he originally took possession under the trustee, he might subsequently disseise him, and make time run in his own favour. (*Cholmondeley v. Clinton*, 1817, 2 Mer. p. 360.) Disseisin was effected by any distinct claim to hold adversely to the trustee (*Earl of Pomfret v. Lord Windsor*, 1752, 2 Ves. S. 472; *Faussett v. Carpenter*, 1831, 2 Dow & C. p. 243); or might, perhaps, be presumed from lapse of time. (*Earl of Portsmouth v. Lord Effingham*, 1750, 1 Ves. S. p. 435.)

Under the present law the *cestui que trust* in possession is still regarded as tenant at will to the trustee (*Garrard v. Tuck*, 1849, 8 C. B. 231); and, while the tenancy lasts, the possession of the *cestui que trust* is the possession of the trustee, and time does not run against the latter. (*Melling v. Leak*, 1855, 16 C. B. p. 669.) If the tenancy were an ordinary tenancy at will, it would be deemed to determine at the end of the first year, but the proviso to sect. 7 of the Act of 1833 especially excludes the case of a *cestui que trust* holding under his trustee, and the statute only runs where there has been an actual determination of the tenancy. Cases of such actual determination do not often arise. Apparently, the matter is governed by the ordinary rules as to the determination of tenancies at will (*Doe v. Phillips*, 1847, 10 Q. B. 130; *Melling v. Leak*,

supra); but at any rate any act on the part of the *cestui que trust* will be sufficient which would have amounted to a disseisin under the old law. The above supposes that the *cestui que trust* on entering recognizes the title of the trustee. If he enters without such recognition, no tenancy at will is created; his possession is not the possession of the trustee, and the statute runs against the latter. (*Burroughs v. M'Creight*, 1844, 1 Jo. & Lat. 290; *Bolling v. Hobday*, 1882, 31 W. R. 9.) The proviso to sect. 7 of the Act of 1833, excluding trusts, does not refer specially to express trusts, but there seems to be no doubt that it must be so restricted, and that it corresponds in this respect to sect. 25. (*Doe v. Rock*, 1842, Car. & M. 549.) *Drummond v. Sant* (1871, L. R. 6 Q. B. 763), is an authority to the contrary, but the *ratio decidendi* seems to have been erroneous. The principle upon which it is suggested the case might have been decided will be noticed immediately. Sect. 25 does not prevent time running in favour of a constructive trustee; neither does the proviso to sect. 7 prevent it running in favour of a constructive *cestui que trust*.

Constructive trusts.

Constructive trusts not being within the proviso of sect. 7, the tenancy at will existing in such a case between the trustee and *cestui que trust* is subject to the ordinary rule of the section, and the trustee's right of entry accrues at latest at the end of the first year of the tenancy. (*Post*, p. 232.) Thereupon, time runs in favour of the *cestui que trust*, and, although he does nothing adverse to the title of the trustee, in twelve years that title is extinguished. Apparently, the result, in the case of a *cestui que trust* with a limited interest, is to vest the legal fee in him discharged from the equities of persons entitled in remainder, but this is so startling that the Courts have naturally shrunk from adopting it. The true answer

seems to be that, since the trustee would be restrained in equity from interfering with the possession of the *cestui que trust* during the continuance of his estate, the latter in turn, and also persons claiming under him, will be restrained from setting up the statute in any ejectment brought to recover possession after the natural termination of the equitable estate. Formerly, this would have required separate proceedings in equity in aid of the ejectment, and it was the endeavour to save the equitable remainders without such proceedings properly instituted that caused the difficulty in *Scott v. Scott* (1854, 4 H. L. C. 1065; see judgment of Maziere Brady, L.C., 11 Ir. Eq. R. p. 509:—"I think if this bill had been filed to aid that ejectment, the defendant would have been restrained from relying on that bar"). So in *Drummond v. Sant* (*supra*), it led to the apparently improper extension of the proviso of sect. 7 to the case of a constructive trust. At the present time no difficulty can arise, since all necessary equitable relief would be given in the action of ejectment. (Cf. *Warren v. Murray*, Times, 9 July, 1894.) The case of *Scott v. Scott* is long and complicated, but if the above principles are borne in mind, the perusal of it may be found to be facilitated. (See 38 Sol. Journ. 612.)

(3.) *In Favour of a Stranger.*

A stranger in possession of land may either hold adversely to the trustee, or, admitting the trustee's title, may claim to hold under him as *cestui que trust*. Where he holds adversely to the trustee, it was settled under the old law that the statute ran in his favour as against the trustee and also the *cestui que trust*. (*Lewellin v. Mackworth*, 1740, 2 Eq. Ca. Abr. 579; cf. *Hovenden v. Lord Annesley*, 1806, 2 Sch. & Lef. p. 629; *Pentland v. Stokes*, 1812, 2 B. & B. p. 75; *Widdowson v. Earl of Harrington*,
Possession adverse to trustee and *cestui que trust*.

1820, 1 Jac. & W. p. 556 ; Preston on Abstracts, II. 378.) The Real Property Limitation Act, 1833, does not seem to have directly affected this principle, and since the effect of the statute is now, not merely to bar the trustee's remedy, but to extinguish his right, there is additional reason for saying that the title of the *cestui que trust*, which is dependent upon it, is extinguished also. The question is of importance in cases where the *cestui que trust* is under disability, or where his estate was, at the commencement of the adverse possession, future. In *Quinton v. Frith* (1868, Ir. R. 2 Eq. p. 416), it was treated as open ; but in *Cooper v. Warre* (1865, 18 Ir. Jur. 24), Maziere Brady, L.C., intimated his opinion that the statute would be a bar to the trustees and also to the *cestui que trusts*. At the same time, since the Judicature Acts, it seems probable that the *cestui que trust* can himself bring an action to recover possession (cf. *Walsh v. Lonsdale*, 1882, 21 Ch. D. 9), and hence one of the reasons of the old law, that the *cestui que trust* could only sue in the name of the trustee, and therefore, only while the trustee could sue, is gone. And although such a case as *Scott v. Scott* (1854, 4 H. L. C. 1065) would now be decided on the ground suggested above (*ante*, p. 221), the judgment of Lord Cranworth, C., shows an evident reluctance to admit that an adverse legal title is necessarily clear of the equities affecting the previous legal title. It may be said that it is the duty of the trustee by asserting his legal title to protect the equitable interests, and that, if he neglects to do so, it is not for the Court to interfere. Moreover, the estate taken by the adverse possessor cannot be directly affected by the equities attaching to the former estate of the trustee, and since he might at any moment have been ejected by the trustee, there is no clear ground for restraining him from setting up the statute. But although there are technical objec-

tions to allowing an action to be brought on the equitable title after the legal title has been extinguished, it is not improbable that, when the question arises, the Courts will discover some ground for permitting this to be done.

But the possessor may recognize the legal title of the trustee, and may claim to hold adversely to the *cestui que trust* alone. This was the case which was considered at such length in *Cholmondeley v. Clinton* (1820, 2 Jac. & W. 1; *ante*, p. 168), the difficulty being caused by the doubt whether, under the old law, equity could recognize the bar of the statute when there had been no disseisin. Under the present law no such question can arise. In whatever proceedings the true *cestui que trust* seeks to enforce his claim to possession against the apparent *cestui que trust*, this claim is an equitable claim, not saved as against the apparent *cestui que trust* by sect. 25 of the Act of 1833, which only refers to suits against the express trustee and persons claiming through him. It is accordingly barred in the same manner as if it were a legal claim. But this assumes that the stranger is in possession of the land or in immediate receipt of the rents and profits. He is in the position of owner, although he claims only under an equitable title. He makes a wrongful claim to be *cestui que trust*, and as such is let into possession. If he merely receives the rents and profits from the trustee, the result appears to be different. (*Lister v. Pickford*, 1865, 13 W. R. 827.) The trustee is in possession and he holds for the person really entitled.

Possession
adverse to
cestui que
trust only.

(4.) *In Favour of one Cestui que Trust against the Rest.*

The case where one of several *cestui que trusts* has been in possession of more than his share of the trust estate depends upon principles which have been considered under the previous heads. If he has gained such a possession as

Possession
by one of
several
cestui que
trusts.

to make time run against the trustee, and extinguish the legal estate, the result is to extinguish the equities of the other *cestui que trusts* also. In *Harmood v. Oglander* (1803, 8 Ves. p. 131), it seems to have been recognized under the old law that an ouster of the trustee would be an ouster also of the other *cestui que trusts*, and there are clear authorities to the same effect under the present law. (*Burrough v. M'Creight*, 1844, 1 Jo. & Lat. 290; *Bolling v. Hobday*, 1882, 31 W. R. 9.) But this must be taken subject to what has already been said as to the possible recognition of equitable rights after the estate of the trustee has been extinguished. So, where one *cestui que trust*, while recognizing the title of the trustee, is in possession of more than his share, time will run in his favour against the rest. An opposite opinion seems to have been expressed by Turner, L.J., in *Knight v. Bowyer* (1858, 2 D. G. & J. p. 441), but there the trustees were in receipt of the rents, and the case falls within the principle of *Lister v. Pickford* (1865, 13 W. R. 827).

4. MORTGAGOR AND MORTGAGEE.

Division of
subject.

Where land is subject to a mortgage, the operation of the statute has to be considered, in favour of the mortgagor against the mortgagee, in favour of the mortgagee against the mortgagor, and in favour of a stranger, whether against the mortgagor only, or against both the mortgagor and the mortgagee.

(1.) *In Favour of the Mortgagor.*

Relation
of mort-
gagor in
possession
to mort-
gagee.

It is sometimes said that the mortgagor in possession is tenant at will to the trustee, but the expression must be taken with caution (*Keech v. Hall*, 1778, 1 Doug. 21; *Moss v. Gallimore*, 1779, 1 Doug. 279); in particular there

is no such tenancy as to deprive the mortgagee of his immediate right to possession. (*Birch v. Wright*, 1786, 1 T. R. p. 383.) It has been suggested that the mortgagor is more like a tenant at sufferance (*Doe v. Maisey*, 1828, 8 B. & C. 767; *Pope v. Biggs*, 1829, 9 B. & C. 245), but no legal relation, it has been observed, affords a complete analogy. (*Cholmondeley v. Clinton*, 1820, 2 Jac. & W. p. 183.)

In the Real Property Limitation Act, 1833, no special provision was made for the case of a mortgagor in possession, and since the mortgagee has a right of entry either immediately on the execution of the mortgage, or at any rate on default in payment of the principal at the specified day, it was considered that, under the general rule of the statute, time would, at one of such dates, run against him, notwithstanding that interest on the mortgage debt was being regularly paid. (*Doe v. Williams*, 1836, 5 A. & E. 291.) Hence, by 7 Will. IV. & 1 Vict. c. 28 (cf. sect. 9 of Real Property Limitation Act, 1874), it was provided that any person entitled to or claiming under any mortgage of land might recover the land within [twelve] years next after the last payment of any part of the principal money or interest, although more than the statutory period had elapsed since the first accrual of the right of entry or action. (See *Heath v. Pugh*, 1881, 6 Q. B. D. p. 362.) The effect is that the statute runs immediately on the accrual of a right of entry to the mortgagee, but it may be continually checked by payment of interest.

Where the mortgagor has assigned the equity of redemption, payment can clearly be made by the assignee (*Forsyth v. Bristowe*, 1853, 8 Ex. 716), and it appears to be correct to say that an effectual payment can still be made by the mortgagor. (*Chinnery v. Evans*, 1864, 11 H. L. C. 115.) If the same person temporarily unites the characters of

When an effectual payment is made.

mortgagor and mortgagee, he is considered as applying the rents and profits in keeping down the interest, and the statute accordingly does not run. (*Burrell v. Earl of Egremont*, 1843, 7 Beav. 205; *Topham v. Booth*, 1887, 35 Ch. D. 607; and generally as to the effect of payment, see *post*, p. 253.)

Future
interest
in mort-
gagee.

Where the interest of the mortgagee is reversionary, time does not run against him until his interest falls into possession. (*Hugill v. Wilkinson*, 1888, 38 Ch. D. 480.) And if during the currency of the statute the mortgagee brings foreclosure and obtains an order absolute, since the effect of the order is to vest in him a new title as owner, he can assert this title at any time within twelve years of the date of the order. (*Heath v. Pugh*, 1881, 6 Q. B. D. 345; 7 App. Cas. 235.)

Satisfac-
tion of
mortgage.

When the mortgage is paid off, the mortgagee becomes constructively a trustee for the mortgagor. (*Quarrell v. Beekford*, 1816, 1 Madd. p. 278.) The mortgagor accordingly is tenant at will, and under sect. 7 of the Act of 1833 gains a legal title in thirteen years. (*Sands to Thompson*, 1883, 22 Ch. D. 614; *post*, p. 232.)

(2.) *In Favour of the Mortgagee.*

Mort-
gagee in
possession.

Under the old law, although the mortgagee was said to be for some purposes a trustee for the mortgagor, yet this was not so in reference to the statute, and if he went into possession and held for more than twenty years without acknowledgment and without account, the mortgagor's equity of redemption was barred. (*Dillon v. Parker*, 1822, Jac. p. 513.) So, under the present law, when a mortgagee has obtained possession of land, the mortgagor can only bring an action to redeem the mortgage within twelve years after the time at which the mortgagee obtained such possession, unless in the meantime an acknowledgment in

writing of the mortgagor's title, signed by the mortgagee, has been given to the mortgagor or his agent. (R. P. L. A. 1874, s. 7.)

But to gain the benefit of the section the mortgagee must enter solely in his character as mortgagee. In *Broune v. Bishop of Cork* (1839, 1 Dr. & Wal. 700), it was decided that this, which was the rule of the old law (*Corbett v. Barker*, 1795, 3 Anst. p. 759; *Raffety v. King*, 1836, 1 Keen, 601), did not apply under the Act of 1833, the terms of sect. 28 (now replaced by sect. 7 of the Act of 1874) expressly barring the right of the mortgagor without regard to the nature of the mortgagee's possession. In *Hyde v. Dallaway* (1843, 2 Hare, 528), on the other hand, the rule was treated as still existing, being simply an application of the principle that the statute does not run where the person in whose favour it would run and the person against whom it would run are identical.

It was formerly the rule that if the mortgagor remained in possession of part of the mortgaged property, time would not run against him as to any other part (*Blake v. Foster*, 1814, 2 B. & B. 565); but no such distinction is made in the Real Property Limitation Acts, and the bar of the statute now applies to any land of which the mortgagee has in fact taken possession. (*Kinsman v. Rouse*, 1881, 17 Ch. D. 104.)

(3.) *In Favour of a Stranger.*

A stranger who is in possession of land subject to a mortgage may claim to have gained a title either against the mortgagor only, or against both mortgagor and mortgagee. The former case was the subject of the decision in *Cholmondeley v. Clinton* (1820, 2 Jac. & W. 1; *ante*, p. 168), under the old law, and it was settled that a stranger might gain a title to the equity of redemption by lapse of time.

The same result follows under the present law, the true owner's right in equity to possession of the land being liable to be barred exactly as though it were a legal right.

Mort-
gagee's
title saved
by pay-
ment of
interest.

Where a stranger is in possession without recognition of the mortgage, *prima facie* time runs in his favour as against both mortgagor and mortgagee, but as against the latter the operation of the statute may be prevented by payment of principal or interest under 1 Vict. c. 28, and a payment by the mortgagor is effectual for this purpose, notwithstanding that he is out of possession. (*Doe v. Eyre*, 1851, 17 Q. B. 366; *Doe v. Massey*, *ibid.* 373; *Ford v. Ager*, 1863, 2 H. & C. 279.) As long as such payment is made, the stranger does not gain a title against the mortgagee, though he may gain one against the mortgagor. And the mortgage is kept up by payment, although created while time is already running against the mortgagor, provided, of course, the statutory period has not expired at the time of its creation. (*Doe v. Eyre*, *supra*.)

5. LORD AND COPYHOLDER.

Division
of subject.

In the same manner as under the last head the inquiry divides itself into three parts—the operation of the statute in favour respectively of the lord, the copyholder, and a stranger.

(1.) *In Favour of the Lord.*

Heir's
right to
admit-
tance.

When a copyholder has died, and his heir, after proclamation duly made, does not come to be admitted, the lord may, by virtue of a special custom, seize the lands absolutely, and the interest of the heir is thereby forfeited; but in the absence of such custom he can only seize *quousque*—that is, till the heir comes to be admitted. (*Doe v. Helier*, 1789, 3 T. R. 162; *Doe v. Trueman*, 1831, 1 B. & Ad. 736.) But proceedings on the part of the

heir to compel admittance fall within the phrase "action to recover land," and he is barred in twelve years from the seizure. (*Walters v. Webb*, 1870, L. R. 5 Ch. 531.)

(2.) *In Favour of Copyholder.*

By "copyholder" is here to be understood a person who, being entitled to admittance, holds possession without admittance. The question then arises whether, by the lord's omission to compel him to procure admittance, the tenure is changed to freehold. The current opinion seems to be that it is not (Dart, V. & P. 6th ed. 467; Elton on Copyholds, 2nd ed. 153, 219; Scriven on Copyholds, I. 287; cf. *Turner v. West Bromwich Union*, 1860, 9 W. R. 155), and this is supported by the decision of the Court of Appeal in *Eccl. Commrs. v. Parr* (1894, 42 W. R. 561). The lord's right to seize *quousque* is apparently a right of entry within the meaning of sect. 1 of the R. P. L. A., 1874, but it seems impossible to assign any certain date for its accrual from which time can be reckoned. In the case of forfeiture time runs from the forfeiture (*Doe v. Helier*, 1789, 3 T. R. 172; *Whitton v. Peacock*, 1834, 3 My. & K. p. 335), but the mere omission of the heir to come in is no cause of forfeiture. Before the lord has any right at all, the homage must present the death of the ancestor, and there must be three proclamations at three successive courts for the heir to come in. (*Doe v. Trueman*, 1831, 1 B. & Ad. 736.) It is only after this has been done that the lord can issue his precept to seize the land. If, then, the proclamations are made, the lord's right of entry arises, and the statute begins to run against him. But in the absence of these formalities, the right never comes into existence. The utmost that can be said is, that the proclamations ought to be made within a reasonable time after the death (Cf. *Lidiard and Jackson's and Broadley's Contract*, 1889, 42

Impossibility of fixing date of accrual of lord's right of entry.

Ch. D. 254); but this principle gives no exact date for the accrual of the lord's right of entry, and without such exact date the statute cannot come into operation.

Presump-
tion of
enfran-
chisement.

While, however, it is doubtful whether the lord can be barred by the statute, an enfranchisement will be presumed if there has been no recognition of the copyhold tenure for a long period, such as a hundred years (*Re Lidiard and Jackson's and Broadley's Contract, supra*), and even against the Crown. (*Roe v. Ireland*, 1809, 11 East, 280.)

Incidents
of copy-
hold
tenure.

Of the various incidents of copyhold tenure other than the lord's right to seize *quousque*, namely, fines, fealty and suit of court, heriots, reliefs, and rents, it would seem that it is only rents which are liable to be barred. (*Howitt v. Earl of Harrington*, 1893, 2 Ch. 497.) There is nothing in the Real Property Limitation Acts applying to fines, and the remaining incidents, though *prima facie* they fall within the definition of "rent" in sect. 1 of the Act of 1833, are excepted on the ground that they fall due only at irregular intervals. (*Ante*, p. 188.) Upon the whole it seems correct to say that while copyhold rents are liable to be extinguished, no change is effected by the statute alone in the tenure. (*E. of Chichester v. Hall*, 1851, 17 L. T. 121.)

(3.) *In Favour of a Stranger.*

Adverse
possession
of copy-
holds.

Where a stranger, whether a disseisor or a tenant at will or licensee of the lord, is in possession of part of the waste of the manor, so that the statute is running against the lord, at the end of the statutory period the lord's title is extinguished, and the land vests as freehold in the stranger. (*Att.-Gen. v. Tomline*, 1880, 15 Ch. D. 150.) But the case of adverse possession of copyholds does not appear to have been discussed. By sect. 1 of the R. P. L. A., 1833, the word "land" is defined to include lands of copyhold tenure, and it is clear that if a stranger

enters on the lands of a copyholder and holds them for the statutory period, the copyholder's rights of entry and of action are barred, and his title extinguished. As against him, then, the stranger is entitled to retain the lands. As against the lord, however, the position of the stranger is a question of some difficulty. As long as there is a tenant on the rolls there is no possession adverse to the lord, and such title as the stranger acquires is *quasi*-copyhold. But though the lord might possibly be compelled to recognize such title and perfect it by admittance, there seems to be no authority for saying that this can be done. Copyholds are held under a system of registration of title, and registration of title is sometimes thought, though it would seem incorrectly, to forbid the acquisition of title by possession.

6. LANDLORD AND TENANT.

Where land is let to a tenant, the statute may operate in favour of the landlord, of the tenant, or of a stranger, but the first case does not call for special treatment. If the tenant does not enter under the lease, time will run against him; and so, too, if the landlord enters wrongfully during the continuance of the lease. The cases to be considered are the second and third, and as to the third it may be noticed that, though a stranger may gain a title either against the tenant or against the landlord, he cannot, during the continuance of the lease, gain a title against both.

Division of subject.

(1.) *In Favour of the Tenant.*

It has been already noticed that, under the old law, a tenant could not, either during the continuance of the lease, or after its termination, gain a title against his landlord. (*Saunders v. Lord Annesley*, 1804, 2 Sch. & Lef. p. 98; *Cholmondeley v. Clinton*, 1821, 4 Bligh, 96.) If

Landlord's right to possession is a future right.

he repudiated the landlord's title during the lease, this was a forfeiture if the landlord chose so to regard it, but he might treat the lease as still subsisting; and further, if the tenant held over after the lease had expired, he was still tenant, though only tenant at sufferance. By the Real Property Limitation Act, 1833, it is specially provided (sect. 35) that the receipt of rent from any tenant shall, as against the tenant, be deemed to be the receipt of the profits of the land for the purposes of the Act, and, consequently, while the landlord is in such receipt, there is no dispossession or discontinuance of the receipt of profits under sect. 3 of the same Act so as to make time run against him. But the necessity for this provision is not clear, and the operation of the statute really depends on the consideration that during the continuance of the tenancy the landlord has no present right of entry. His interest, so far as actual occupation of the land is concerned, is future, and his remedial right does not accrue, and the statute does not run, until his interest—his reversion, that is—falls into possession. But while this is the general rule applicable to tenancies, special provision is made for tenancies at will and yearly tenancies.

(A.) *Tenancies at Will.*

R. P. L.
Act, 1833,
s. 7.

Tenancies at will are governed by sect. 7 of the Act of 1833. The effect of the section is that, if the tenancy is determined within a year of its commencement, and the tenant remains in possession without a renewal of the tenancy, time runs from such determination; if it is not determined within the year, time runs from the end of the year. Thus, if a person enters into possession of land as tenant at will, and nothing further is done, the landlord's title is extinguished in thirteen years. This construction of the section, which was adopted in *Doe v. Turner* (1840,

7 M. & W. 226), and *Doe v. Carter* (1847, 9 Q. B. 863), was doubted by Lord Campbell, C.J., in *Randall v. Stevens* (1853, 2 E. & B. 641). He found it difficult to admit that a tenancy at will was to be deemed in all cases to have determined at latest at the end of a year, and he would only have made that date the starting point for the statute when there was no actual determination subsequently within the statutory period. But this was simply an expression of opinion, the case being decided on the ground that the lessor had resumed possession, and the earlier view was adopted by the Privy Council in *Day v. Day* (1871, L. R. 3 P. C. 751).

A tenancy at will is created when lands or tenements are let by one man to another to be held at the will of the lessor (Litt. s. 68), and such a tenancy is usually implied from a simple permission to occupy (*Doe v. Wood*, 1845, 14 M. & W. p. 687), or from an entry under a void lease. (*Braythwaite v. Hitchcock*, 1842, 10 M. & W. 494.) The Courts lean, however, to yearly tenancies as giving more security to the tenant, and where there is a payment of rent referable to a year, or the aliquot part of a year, the tenancy at will is converted into a yearly tenancy. (*Richardson v. Langridge*, 1811, 4 Taunt. 128; Tudor's L. C. in Real Prop. 3rd ed. p. 4; 2 Sm. L. C. 9th ed. p. 125.) The existence of a tenancy at will may be negatived by showing that the occupier has no exclusive possession on his own account. He may be servant or bailiff, or may be merely allowed on the premises as licensee, but an attempt to apply this principle failed in *Hogan v. Hand* (1861, 14 Moo. P. C. 310), and *Mayor of Brighton v. Guardians of Brighton* (1880, L. R. 5 C. P. D. 368).

Creation
of tenancy
at will.

The determination of the tenancy at will may be express, as where there is an actual demand of possession

Determi-
nation of
tenancy at
will.

or other intimation that the tenant's occupation is to cease (Co. Litt. 55 b.; *Doe v. Jones*, 1830, 10 B. & C. 718; *Pollen v. Brewer*, 1859, 7 C. B. N. S. 371); or implied, as where the lessor does any open act of ownership on the land which would not be lawful during a tenancy, and which would, therefore, on the assumption of the continuance of the tenancy, render the lessor liable to the lessee in trespass. (*Turner v. Bennett*, 1842, 9 M. & W. p. 646.) It is determined also by the death of either party, by a conveyance of the reversion by the lessor (*Doe v. Thomas*, 1851, 6 Ex. p. 857), and by an assignment of the premises by the lessee, so soon, at least, as the lessor has notice. (*Pinhorn v. Souster*, 1853, 8 Ex. p. 772.) But though the lessor has the right at any time to determine the tenancy at will and enter, he has not, until actual determination, such an immediate right of entry as will make the statute run against him. (*Garrard v. Tuck*, 1849, 8 C. B. 231.)

Statute is checked by re-entry or fresh tenancy.

The statute runs in favour of the tenant from the end of the first year of the tenancy when no steps have previously been, or are then, taken by the landlord to assert his title, but its operation is stopped by a substantial entry, such as to amount to a resumption of possession (*Randall v. Stevens*, 1853, 2 E. & B. 641), or by the subsequent creation of a fresh tenancy at will. (*Turner v. Bennett*, 1842, 9 M. & W. 643; *Locke v. Matthews*, 1863, 13 C. B. N. S. 753; *Hodgson v. Hooper*, 1860, 3 E. & E. 149.)

(B.) *Yearly Tenancies.*

R. P. L.
Act, 1833,
s. 8.

Sect. 8 of the Act of 1833 provides that in the case of a tenancy from year to year without any lease in writing, the reversioner's right of entry shall be deemed to have accrued at the end of the first year, or at the last receipt of rent (which shall last happen).

Such a tenancy may be created expressly, either by parol or in writing, or may be implied from payment of rent upon entry without a valid lease (*Doe v. Bell*, 1793, 5 T. R. 471; *Clayton v. Blakey*, 1798, 8 T. R. 3; 2 Sm. L. C. 9th edit., 110, 118; *Crawley v. Price*, 1875, L. R. 10 Q. B. 302); or from payment of rent by a tenant who holds over after the expiration of his lease. (*Archbold v. Scully*, 1861, 9 H. L. C. p. 387.) Payment of rent, however, does not of itself create a tenancy from year to year. It is only evidence of a tenancy (*Finlay v. Bristol and Exeter Ry. Co.*, 1852, 7 Ex. 409), and though, in general, it is conclusive evidence (*Doe v. Watts*, 1797, 7 T. R. 83; *Bishop v. Howard*, 1823, 2 B. & C. 100), this is not necessarily the case, and it is open to the party to show the circumstances under which the rent was received, as that he was ignorant of the death of a person for whose life the premises were held (*Doe v. Crago*, 1848, 6 C. B. 90), or that a tenancy at will had been expressly created. (*Doe v. Cox*, 1847, 11 Q. B. 122.)

The section gives two alternative points for the commencement of the statute—the end of the first year of the tenancy, or the last receipt of rent; and hence, although such last receipt may be more than twelve years after the end of the first year, the lessor is entitled to rely upon it as giving the date from which the statute is to run. (*Bunting v. Sargent*, 1879, 13 Ch. D. 330.) *Prima facie*, it might be supposed that the title is extinguished at the end of the twelve years, and that a subsequent payment of rent would be as ineffectual to revive it as an acknowledgment. (Cf. *Sanders v. Sanders*, 1881, 19 Ch. D. 373.) But in *Bunting v. Sargent*, Jessel, M.R., observed that sect. 34 only extinguishes the title “at the determination of the period limited by this Act,” and that under sect. 8 the statutory period was to be reckoned from the last

Creation
of yearly
tenancy.

Operation
of statute.

receipt of rent, whenever this took place, provided only it was subsequent to the end of the first year of the tenancy.

The payment of rent does not support the tenancy and prevent the possession from being adverse. It simply gives a starting point for the statute. (*Baines v. Lumley*, 1868, 16 W. R. 674.) A question of fact may arise as to whether a particular payment is made in respect of rent or not (*Att.-Gen. v. Stephens*, 1855, 6 D. M. & G. 111); and though payment of rent is similar in its effect to an acknowledgment of title, it may be proved by the parol admission of the tenant. (*Doe v. Beckett*, 1843, 4 Q. B. 601.) To constitute a lease in writing which will take the case out of sect. 8, there must be an instrument passing an interest in the land, and not merely showing the conditions of the holding. (*Doe v. Gower*, 1851, 17 Q. B. 589.)

(C.) *Terms of Years.*

Operation
of statute.

In the case of tenancies for a term of years, and of yearly tenancies under a lease in writing, the Real Property Limitation Acts have no provision interfering with the general rule that, since the lessor has no present right to possession of the land, time does not run against him until, by the determination of the term, his reversion falls into possession. It makes no difference that rent has not been paid for more than twelve years (*Doe v. Oxenham*, 1840, 7 M. & W. 131); and since the statute only bars rent of the nature of rent-charge (*Grant v. Ellis*, 1841, 9 M. & W. 113), six years' arrears of rent may be recovered at any time during the currency of the term. (*Archbold v. Scully*, 1861, 9 H. L. C. 360.) And provided the rent is a conventional rent reserved upon a lease, it is not an objection that no reversion remains in the lessor. This is the case where an underlease is created for

the whole of the residue of the term. (*Re Turner's Estate*, 1861, 11 Ir. Ch. Rep. 304.)

If the lease turns out to be void, time runs from the date when possession is taken, unless a yearly tenancy is inferred from payment of rent. (*Magdalen Hospital v. Knotts*, 1879, 4 App. Cas. 324; *Webster v. Southey*, 1887, 36 Ch. D. 9.) But the mere non-existence of a lease does not make the statute run, if the circumstances are such that in equity the lease must be assumed to exist. (*Archbold v. Scully*, 1861, 9 H. L. C. 360.) This follows from sect. 24 of the Act of 1833, by which the equitable rights of the parties are placed, for the purpose of the statute, on the same footing as though they were legal rights.

During the continuance of the lease the lessee may disclaim the lessor's title, either by direct repudiation of the relation of landlord and tenant, or by a claim to hold possession on a ground inconsistent with the existence of that relation. (*Doe v. Stanion*, 1836, 1 M. & W. p. 703; *Doe v. Cooper*, 1840, 1 M. & Gr. p. 139; *Vivian v. Moat*, 1881, 16 Ch. D. 730.) Or, in fraud of his landlord, he may give up possession to a third party with the intention of enabling such third party to set up a hostile title. (*Doe v. Flynn*, 1834, 1 Cr. M. & R. 137.) But though such disclaimer—provided, in the case of a term, though not, perhaps, in the case of a tenancy from year to year, it does not rest upon mere words (*Doe v. Wells*, 1839, 10 A. & E. 427)—may be a ground for forfeiture, it does not make the statute run against the lessor. (*Archbold v. Scully*, 1861, 9 H. L. C. p. 381.)

The lease may be determined by surrender, either express or implied, and a surrender is implied upon the granting of a new lease to the same tenant (*Lyon v. Reed*, 1844, 13 M. & W. 285); but the case is of no special importance with regard to the lessee. If upon the surrender

Possession
under void
lease.

Disclaimer
by lessee.

Effect of
surrender
of lease.

the lessor's estate falls into possession, by the new lease he is again relegated to the position of reversioner, and the statute, if momentarily it runs against him, is at once checked. The case is of importance, however, when another than the lessee is in occupation, whether an underlessee or a mere stranger, and will be considered subsequently.

Encroach-
ments by
lessee.

Encroachments by the tenant are, in general, deemed to be made for the benefit of the landlord, but this rule can best be explained in dealing with the nature of the title which is acquired under the statute. (*Post*, p. 288.)

(2.) *In Favour of Strangers.*

Adverse
occupa-
tion.

The effect of adverse occupation of land by a stranger depends on the same considerations in the case of land subject to a lease as in any other case where the immediate right to possession is in one person, the reversion or other future interest in another. As against the lessee, the statute runs from the time when the wrongful possession commences; as against the lessor, it does not run until the termination of the lease. And from that time it runs also against persons claiming under a subsequent lease. (*Kennedy v. Woods*, 1867, Ir. R. 1 C. L. 76.)

Effect of
surrender
of lease.

In the event of the termination of the lease by a surrender implied from the grant of a fresh lease, a distinction has been taken between the case of occupation by an underlessee and occupation by a stranger. In *Corpus Christi College v. Rogers* (1879, 49 L. J. C. L. 4), it was held that, since the surrender is simultaneous with the grant of the new lease, there is no moment when the lessor can enter upon or bring an action for the recovery of the land, and consequently the statute does not commence to run. In *Ecclesiastical Commissioners v. Rowe* (1880, 5 App. Cas. 736), on the contrary, Lord Selborne, C., pointed out that an estate in possession must vest in the

lessor out of which the new leasehold interest is derived; but whether at the same time there accrues to him a right of action to recover the land depends on the character of the actual occupation. If the occupier is a person without title—whether a trespasser or a disseisor—the lessor's estate in possession carries with it the right to enter upon the land; but if the occupier is an underlessee, rightfully in possession under the original lessee, the lessor has no such right of action, and the statute does not run against him. In *Ecclesiastical Commissioners v. Trecemer* ((1893) 1 Ch. 166), the same principle was applied in the case of an express surrender of the head-lease followed by a new grant, the underlease being preserved intact by virtue of 4 Geo. II. c. 28.

It has been already pointed out (*ante*, p. 166) that previously to 1833 adverse receipt of rent was not an actual disseisin of the freeholder, and according to *Doe v. Danvers* (1806, 7 East, 299; see argument in *Cholmondeley v. Clinton*, 1821, 4 Bligh, p. 37) it did not affect his right to recover the land at the end of the term. But the receipt of rent amounts to possession of the estate for the purpose of making the receiver the apparent owner, and an adverse receipt is virtually a dispossession of the true owner, and ought to have the same effect as a dispossession on his title. (See First Report of Real Property Commissioners, p. 47.) Accordingly, it was provided by sect. 9 of the Real Property Limitation Act, 1833, that when any person is in possession of land by virtue of a lease in writing, by which a rent of twenty shillings or upwards is reserved, and the rent is received by some person wrongfully claiming to be entitled to the reversion, the true reversioner's right of entry or action shall be deemed to have first accrued at the time of the first wrongful receipt of rent; and no such right shall be deemed to have first accrued

Adverse
receipt of
rent.

to the true reversioner on the determination of the lease. The section also applies to a lease of a rent-charge, and may be referred to as an illustration of the different meanings given in the statute to the word "rent." (See *Doe v. Angell*, 1846, 9 Q. B. p. 356.)

Effect of
R. P. L.
Act, 1833,
s. 9.

The change effected by the section was noticed by Lord St. Leonards in *Scott v. Nixon* (1843, 2 Con. & L. p. 191). "The new statute," he said, "put an end to the doubt about the effect of the receipt of rent, for under the old law it could not be deemed an ouster, and no man could by such wrong divest a right: the new Act, however, made receipt of rent equivalent to possession." (Cf. *Twiss v. Noblet*, 1869, 4 Ir. R. Eq. p. 78.) Since the operation of the statute depends upon the receipt of rent—a receipt which must be actual and not constructive merely (*Twiss v. Noblet*, *supra*)—it follows that the lessee can gain no title under the section by simply withholding rent (*Doe v. Oxenham*, 1840, 7 M. & W. 131; *Grant v. Ellis*, 1841, 9 M. & W. 113); nor can a stranger gain a title by entering during the continuance of the lease. (*Chadwick v. Broadwood*, 1840, 3 Beav. 308.)

"Wrong-
ful re-
ceipt"
necessary.

And there must not only be an actual receipt of rent by a person other than the true reversioner, but he must also wrongfully claim the reversion. Hence it is necessary to consider the character in which he receives the rent, and, in setting up sect. 9 as a defence, the receipt of the rent must be expressly stated to be wrongful, or facts must be alleged which are inconsistent with a rightful receipt. The statute does not run, for instance, where the receipt of rent is really in satisfaction of a rent-charge (*Doe v. Godsill*, 1840, 4 Q. B. 603, n. (b); 5 Jur. 170); or of jointure, even though there is a surplus of which no account is given to the reversioner (*Shaw v. Keighron*, 1869, 3 Ir. R. Eq. 574); nor does it run where the rent is

received by a person who purports to be the agent of the reversioner. (*Lyell v. Kennedy*, 1889, 14 App. Cas. 437.) But for a claim to be "wrongful" it is not necessary that it should be immoral. It is enough that it is inconsistent with the title of the true owner, and this requirement is satisfied though it is put forward under a mistake, and without any intention of depriving the true owner of his property. In *Williams v. Pott* (1871, L. R. 12 Eq. 149), the joint application of this principle and of the doctrine of agency had the curious effect of barring an owner who was himself in actual receipt of the rent of the land.

Where land is in the occupation of a sub-lessee, and the sub-lessee pays his rent direct to the superior landlord, it is a question of fact, to be decided on the whole circumstances of the case, whether the payment is made by arrangement with and on behalf of the intermediate lessee, in which case the statute does not run against him; or whether the superior landlord receives it under a wrongful claim to the reversion on the sub-lease, so that the statute runs. (*Drew v. Earl of Norbury*, 1846, 3 Jo. & Lat. 267; *Hayes v. Woodley*, 1852, 3 Ir. Ch. R. 142; *Twiss v. Noblet*, 1869, 4 Ir. R. Eq. p. 80.)

Receipt of rent by lessor from sub-lessee.

The immediate effect of sect. 9, taken in connection with sect. 34, is merely to extinguish the title of the reversioner; the nature of the title acquired by the adverse receiver of the rents will be considered subsequently.

Title by receipt of rent.

7. SUMS OF MONEY CHARGED ON LAND.

Sect. 8 of the Real Property Limitation Act, 1874 (replacing sect. 40 of the Act of 1833), enacts that no proceeding shall be brought to recover any sum of money charged upon or payable out of land, at law or in equity, "but within twelve years next after a present right to receive the same shall have accrued to some person capable

R. P. L. Act, 1874, s. 8.

of giving a discharge for or release of the same," with a saving for the case of acknowledgment or part payment. Thus the statute runs so soon as a present right to receive accrues to a person capable of giving a discharge. (See *Farran v. Beresford*, 1843, 10 Cl. & F. 319.) In *Dillon v. Cruise* (1840, 3 Ir. Eq. R. p. 81) it was suggested that the present right to receive might not be deemed to accrue if there were no effectual means of enforcing it. But the section, differing herein from the provisions of the Acts as to land and rent charges, is dealing with the substantive, not the remedial right; and it is enough that there is a present right to receive money secured by a charge, though the time for enforcing the charge has not arrived. (*Hornsey Local Board v. Monarch Building Society*, 1889, 24 Q. B. D. 1.)

Successive
interests.

A charge on land may, like the land itself, be the subject of successive interests, and during a life tenancy of a charge no present right to receive accrues to the person subsequently entitled. (*Burrowes v. Gore*, 1858, 6 H. L. C. p. 955.) Conversely, a charge may be vested absolutely, but may cover only a future interest in land. Here, though the land cannot be presently sold, it is otherwise with the future interest. This can be sold and the charge realized. Consequently there is a present right to receive, and the statute runs. (*Re Owen*, 1894, 38 Sol. Journ. 617.)

Accrual of
fresh right
to receive.

Sect. 8 of the Act of 1874 speaks of the time when the right to receive accrues, not, like sect. 1, of the time when it *first* accrues (*Ryan v. Cambie*, 1840, 2 Ir. Eq. R. p. 334); and hence, if a fresh right accrues in respect of the same debt, this will give a new starting point for the statute. The principle has been applied in the case of judgments where a new right to receive accrues upon the revivor of the original judgment by *sci. fa.* (*Farran v. Ottiwell*, 1839, 2 Jebb & S. 97; *Farran v. Beresford*, 1843, 10 Cl. & Fin. 319; *Farrell v. Gleeson*, 1844, 11 Cl. & Fin. 702; *Re Blake*, 1853, 2 Ir. Ch.

R. 643), or when a fresh judgment is obtained in an action brought on the original judgment. (*Watters v. Lidwill*, 1847, 9 Ir. L. R. 362.) But proceedings cannot be taken to revive a judgment after the lapse of twelve years (*Dunne v. Doyle*, 1860, 10 Ir. Ch. R. 502), unless the right to receive has been kept alive by payment or otherwise. (*Williams v. Welch*, 1846, 3 Dowl. & L. 565.)

The Real Property Limitation Act, 1874, it may be noticed, expressly refers to judgments; and it is settled that it operates to bar judgments generally, and not those only which constitute a charge on land. (*Jay v. Johnstone*, (1893) 1 Q. B. 189.)

Statute bars all judgments.

For the statute to run it is further necessary that there should be a person capable of giving a discharge. (See per Lindley, L.J., in *Hornsey Local Board v. Monarch Building Society*, 1889, 24 Q. B. D. p. 10.) The effect of this is to save the right of an infant (*Piggott v. Jefferson*, 1841, 12 Sim. 26); and where a charge is vested in trustees who cannot give a discharge, it may operate to save the rights of beneficiaries. (*McCarthy v. Daunt*, 1848, 11 Ir. Eq. R. 29; *Carroll v. Hargrave*, 1870, 5 Ir. R. Eq. 123.)

Person capable of giving discharge.

The fact that money charged on land is secured by an express trust is at the present time no reason for excluding the statute. (R. P. L. A., 1874, s. 10.)

Express trusts.

IV. VARIATIONS OF THE STATUTORY PERIOD.

When the statute has once begun to run, a uniform period of twelve years bars all present claims; but this period is subject to extension in cases of disability, and a similar effect is produced in cases of concealed fraud by the provision that the right of entry shall not be deemed to accrue till the time when the fraud might with reasonable diligence have been discovered. On the other hand, the period may be diminished by acquiescence.

Extension and diminution of period.

1. *Disability.*

R. P. L. Act, 1874, s. 3. By sect. 3 of the Real Property Limitation Act, 1874, a person who, at the time of the accrual of his right of entry, is under any of the disabilities of infancy, coverture, or unsoundness of mind, may, notwithstanding the ordinary period of twelve years has elapsed, bring his action within six years of the removal of the disability. If he dies under disability, the person claiming through him has six years from his death. The disability of coverture, however, seems to be abolished in cases where land belongs to a married woman as her separate property (*Weldon v. Neal*, 1884, 51 L. T. 289; *Lowe v. Fox*, 1885, 15 Q. B. D. 667), since under the Married Women's Property Act, 1882, sect. 1 (2), she is entitled to sue in her own name. (Cf. *Weldon v. De Bathe*, 1884, 14 Q. B. D. 339; *Symonds v. Hallett*, 1883, 24 Ch. D. 346.) The disability of absence beyond seas was expressly abolished by sect. 4 of the Real Property Limitation Act, 1874.

Rules as to disability.

The disability must exist at the date when the right of action accrues for the purpose of the statute, and hence, in the case of a rent-charge, a person who is of sound mind at the date of the last receipt, but is lunatic at the date when the rent next falls due and is not paid, will lose the benefit of the section. (*Owen v. De Beauvoir*, 1847, 16 M. & W. p. 567; 5 Ex. p. 182.) But, provided some disability exists at the accrual of the right of action, the statute continues to be excluded during any further disability which may supervene. (*Borrows v. Ellison*, 1871, L. R. 6 Ex. 128.) There is, however, no allowance for a second disability in a successor in title to the person under disability when the right accrues (R. P. L. A., 1833, s. 18; R. P. L. A., 1874, s. 9); and the extension of time by reason of disability is confined to a maximum period of

thirty years. (R. P. L. A., 1874, s. 5.) The extensions for disability do not apply to the case of a mortgagor coming to redeem (*Kinsman v. Rouse*, 1881, 17 Ch. D. 104; *Forster v. Patterson*, 1881, 17 Ch. D. 132); nor to sums of money charged on land (*Owen v. De Beauvoir*, 1850, 5 Ex. p. 182), notwithstanding an apparent assumption to the contrary in sect. 10 of the Mercantile Law Amendment Act, 1856.

2. *Concealed Fraud.*

Strictly speaking, concealed fraud does not cause an extension of the statutory period. It postpones the date when the right to bring an action to recover land or rent, of which the owner has been deprived by the fraud, is to be deemed to have accrued, and from which, therefore, the period is to be reckoned. By sect. 26 of the R. P. L. Act, 1833, the right of action is to be deemed to have accrued "at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered"; but the section does not affect "a *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed." To gain the benefit of the section, therefore, a plaintiff must make out, "first, that there has been concealed fraud; secondly, that he and his predecessors in title have been deprived of the land by such fraud; and, thirdly, that the fraud has not been discovered, and could not with reasonable diligence have been discovered," within twelve years of action brought. (Per Lindley, L.J., in *Willis v. Earl Howe*, (1893) 2 Ch. p. 549; *Laurance v. Lord Norreys*, 1890, 15 App. Cas. p. 214.)

By concealed fraud, said Kindersley, V.-C., in *Petre v. Petre* (1852, 1 Drew. p. 397), is not meant "the case of a

R. P. L.
Act, 1833,
s. 26.

Require-
ments of
the sec-
tion.

party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." (See per Kay, L.J., in *Willis v. Earl Howe*, *supra*.) It has been said, however, that the mere withholding of information which ought to be communicated to the party entitled is not a concealed fraud within the meaning of the Act. (*Archbold v. Scully*, 1861, 9 H. L. C. p. 384.) Instances of concealed fraud will be found in *Vane v. Vane* (1872, 8 Ch. 383, tampering with a marriage register), and *Sturgis v. Morse* (1857, 24 Beav. 541, omission of property by an insolvent from his schedule); and plausible allegations of fraud, in *Chetham v. Hoare* (1870, L. R. 9 Eq. 571), *Lawrance v. Lord Norreys* (*supra*), and *Willis v. Earl Howe* (*supra*). But it is easier to formulate a case of concealed fraud than to satisfy the other requirements of the section—that the plaintiff or his predecessors in title have been deprived of the land by the fraud, and that it could not with reasonable diligence have been discovered earlier. The plaintiff failed in the first in *Willis v. Earl Howe* (*supra*); in the second in *Chetham v. Hoare* (*supra*), and the earlier case of *Willis v. Earl Howe* (1880, 43 L. T. 375); and in both in *Lawrance v. Lord Norreys*.

3. *Acquiescence.*

R. P. L.
Act, 1833,
s. 27.

The jurisdiction of courts of equity to refuse relief on the ground of acquiescence, to any person whose right to sue in equity is not barred by the Real Property Limitation Acts, is expressly preserved by sect. 27 of the Act of 1833. But a distinction must be made between acquiescence and mere delay. Acquiescence implies assent to infringement of a right (*Duke of Leeds v. Earl Amherst*, 1846, 2 Ph. p. 123; *De Bussche v. Alt*, 1878, 8 Ch. D. 286),

the person assenting being fully aware of his rights. (*Life Association of Scotland v. Siddall*, 1861, 3 D. F. & J. p. 74.) Mere delay, short of the statutory period of limitation, is no bar to the enforcement of a claim, whether legal (*Three Towns Banking Co. v. Madderer*, 1884, 27 Ch. D. 523), or equitable. (*Re Baker*, 1881, 20 Ch. D. 230; *Penny v. Allen*, 1857, 7 D. M. & G. p. 426; *Rochdale Canal Co. v. King*, 1851, 2 Sim. N. S. 78; *Archbold v. Scully*, 1861, 9 H. L. C. p. 383.)

V. PREVENTING THE BAR OF THE STATUTE.

When the statute has commenced to run, it can be stopped either by an assertion of right on the part of the person entitled, or by an admission of the right of such person on the part of the person in possession. An admission of right may be made by acknowledgment, or, where money is due, by part payment. An assertion of right may take the form of re-entry or of the commencement of legal proceedings.

Modes in which bar of statute can be prevented.

1. *Acknowledgment of Title.*

Provisions with respect to acknowledgment are contained, as to land and rent-charges, in sect. 14 of the Real Property Limitation Act, 1833, and, in the particular case of a mortgagee in possession, in sect. 7 of the Real Property Limitation Act, 1874; as to sums of money charged on land and arrears of interest thereon in sect. 8 of the Act of 1874, and sect. 42 of the Act of 1833. Sect. 14 of the Act of 1833 provides, in effect, that where an acknowledgment of the title of the person entitled to any land or rent is given to him or his agent in writing, signed by the person in possession of the land or in receipt of the rent, the statute shall run from the time of the acknow-

Statutory provisions.

ledgment. Sect. 7 of the Act of 1874 gives a similar effect to an acknowledgment in writing of the title of a mortgagor out of possession, or of his right to redeem, given to the mortgagor or his agent signed by the mortgagee, and it contains special provisions for the case of several mortgagors or several mortgagees. (See *Richardson v. Younge*, 1871, 6 Ch. 478.) In the case of sums of money charged on land and arrears of interest, the acknowledgment must equally be in writing, and may be given to the person entitled or his agent, but it may be given either by the person by whom the money or the arrears are payable or his agent.

By whom
acknow-
ledgment
to be
made.

In accordance with the language of sect. 14, the acknowledgment of title to land or rent must be made by the actual possessor. Acknowledgment by an agent will not do (*Ley v. Peter*, 1858, 3 H. & N. 101), though if the person in possession is unable to write, whether from illness or any other cause, the acknowledgment may be signed by a third person at his direction and in his presence. (*Corporation of Dublin v. Judge*, 1847, 11 Ir. L. R. 8; cf. *Helshaw v. Langley*, 1841, 11 L. J. (N. S.) Ch. 17.) An acknowledgment of a sum of money charged on land may be given "by the person by whom the same shall be payable or his agent," and similarly as to arrears of interest. By "payable" it is not to be understood that the person making the acknowledgment must be personally liable to pay. It is sufficient that he is interested in the land, and is liable to lose the land if he does not pay. (*Toft v. Stephenson*, 1851, 1 D. M. & G. 28; *Bolding v. Lane*, 1863, 1 D. J. & S. p. 133.) On the other hand, the acknowledgment cannot be effectually given by a person who was interested in the land, but who has parted with his interest. (*Lyall v. Fluker*, W. N. (1873) 208.)

To whom

An acknowledgment, whether with reference to land or

to sums of money charged on land and arrears of interest, must be given to the person entitled or his agent. Hence an acknowledgment to a third party is not effectual (*Batchelor v. Middleton*, 1847, 6 Hare, p. 83); nor is an acknowledgment to a person before his title accrues (*Holland v. Clarke*, 1842, 1 Y. & C. C. C. 151), or after it has ceased. (*Markwick v. Hardingham*, 1880, 15 Ch. D. p. 352.) But in considering whether an acknowledgment is really made to a person entitled, the Courts have adopted a liberal construction of the statute (*Blair v. Nugent*, 1846, 3 Jo. & Lat. p. 677; *Barrett v. Birmingham*, 1842, 4 Ir. Eq. R. 537), and have been satisfied with admissions in such documents as an affidavit, a pleading, or an insolvent's schedule, although, in some cases, the admission may seem to be made rather to the Court than the party. If an acknowledgment to an agent is relied upon, it is sufficient that it is made to a person who is treated as an agent, and that his agency is subsequently ratified. (*Trulock v. Robey*, 1841, 12 Sim. p. 407.)

The acknowledgment may be made by any document which satisfies the requirements just mentioned as to the persons to make it and the persons to whom it may be made. It may be contained in a letter or series of letters (*Incorporated Society v. Richards*, 1841, 1 Dr. & War. 258; *Fursdon v. Clegg*, 1842, 10 M. & W. 572); in a covenant in a mortgage deed, or in a transfer of a mortgage (*Jayne v. Hughes*, 1854, 10 Ex. 430), provided the person whose title is acknowledged is a party to the deed (*Lucas v. Dennison*, 1843, 13 Sim. 584; *Batchelor v. Middleton*, 1847, 6 Hare, 75); under the old equity practice, in an answer in Chancery (*Goode v. Job*, 1858, 1 E. & E. 6; *Blair v. Nugent*, 1846, 3 Jo. & Lat. p. 677); in an affidavit (*Tristram v. Harte*, 1841, Long. & T. 186); in a schedule filed by an insolvent debtor (*Barrett v. Birmingham*, 1842,

acknow-
ledgment
to be
made.

Form of
acknow-
ledgment.

4 Ir. Eq. R. 537); in a schedule to a petition for sale (*Re West*, 1879, 3 L. R. Ir. 77); or even in a will. (*Millington v. Thompson*, 1852, 3 Ir. Ch. R. 236.) But a mere keeping of accounts by a mortgagee is not an acknowledgment made to the mortgagor so as to prevent the bar of the statute. (Cf. *Baker v. Wetton*, 1845, 14 Sim. 426.)

Parol
evidence.

Although the acknowledgment itself must be in writing, it may be supplemented by parol evidence. Such evidence may be given of the date when the acknowledgment is made (*Edmunds v. Downes*, 1834, 2 Cr. & M. 459, decided on Lord Tenterden's Act, 9 Geo. 4, c. 14), and where the acknowledgment is of a sum due, of the amount. (*Lechmere v. Fletcher*, 1833, 1 Cr. & M. 623; *Lord St. John v. Boughton*, 1838, 9 Sim. 219; *Hartley v. Wharton*, 1840, 11 A. & E. 934.) And although the document is dated, evidence may be given to show that it was in fact executed subsequently, and it will then take effect as an acknowledgment from the date of actual execution. (*Jayne v. Hughes*, 1854, 10 Ex. 430.)

Sufficiency
of acknow-
ledgment.

The question of the sufficiency of the acknowledgment depends solely on the construction of a written document, and is therefore for the judge. (*Doe v. Edmonds*, 1840, 6 M. & W. p. 302; *Collis v. Slack*, 1857, 1 H. & N. 605; *Furness v. Meek*, 1857, 27 L. J. Ex. 34.) It has been argued that to satisfy the statute the writing relied on as an acknowledgment should contain an express admission of title (*Goode v. Job*, 1858, 1 E. & E. 6; *Jayne v. Hughes*, 1854, 10 Ex. 430); but the authorities do not countenance this doctrine, and any writing is sufficient which either expressly, or by implication, contains an admission of title.

Land.

As to land, it was held that there was such an admission in *Incorporated Society v. Richards* (1841, 1 Dr. & War. 258); *Fursdon v. Clegg* (1842, 10 M. & W. 572); *Corporation of Dublin v. Judge* (1847, 11 Ir. L. R. 8); and *Goode v. Job*

(1858, 1 E. & E. 6); that there was no admission in *Doe v. Edmonds* (1840, 6 M. & W. 295). But an admission that a title once existed is not necessarily an admission that it exists at the date of the acknowledgment. (*Hobson v. Burns*, 1849, 13 Ir. L. R. 286.) Hence, though a covenant in a mortgage deed is an admission of the relation in which the parties stand at the date of execution (*Jayne v. Hughes*, 1854, 10 Ex. 430), so as to constitute an acknowledgment by the mortgagor of the mortgagee's title, it is otherwise with a mere recital of an earlier mortgage. (*Hourcutt v. Bonser*, 1849, 3 Ex. 491.)

As to a right of redemption, it was held that there was an acknowledgment in *Trulock v. Robey* (1841, 12 Sim. 402); and in *Stansfield v. Hobson* (1852, 16 Beav. 236; 3 D. M. & G. 620); but no acknowledgment in *Thompson v. Bowyer* (1863, 11 W. R. 975). In the last case the letter of the defendant relied on as an acknowledgment contained an express denial of the plaintiff's claim. If such a letter, observed Romilly, M.R., was to be treated as an acknowledgment of the plaintiff's right to redeem, no one could safely answer a solicitor's letter, except to say that he refused to give any reply.

Right of
redemp-
tion.

As to sums of money charged on land and arrears of interest, the acknowledgment need not amount to a promise to pay such as is necessary under Lord Tenterden's Act in the case of a simple contract debt. An admission of the liability is sufficient, and such admission there was in *Lord St. John v. Boughton* (1838, 9 Sim. p. 225), and *Carroll v. Darcy* (1847, 10 Ir. Eq. R. 321); although in the latter case, inasmuch as there was only an offer to pay out of a particular fund, the admission would not have been construed as a promise to pay. (*Whippy v. Hillary*, 1832, 3 B. & Ad. 399; *Routledge v. Ramsay*, 1838, 8 A. & E. 221.)

Sums
charged
on land.

Effect of
acknow-
ledgment.

The judgment of Lord Westbury, C., in *Bolding v. Lane* (1863, 1 D. J. & S. 122), appears to proceed upon the principle that an acknowledgment is only effectual as against the person making it and persons claiming under him. He there decided that an acknowledgment by a mortgagor of more than six years' arrears of interest being due on a first mortgage does not preclude a subsequent mortgagee from relying upon the statute. The intention of sect. 42, he said, was "to enact a plain and simple rule, that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing, signed by such person, or by some former owner from whom the interest is derived." But the principle, if correct, applies only where there are different persons jointly interested in the property so as to prevent one from being affected by the acknowledgment of another. It does not apply to the acknowledgment of a tenant for life who, for the time being, represents the whole estate. His acknowledgment is binding on the remaindermen (*Smith v. Smith*, 1855, 5 Ir. Ch. R. 88; *Re Fitzmaurices*, 1864, 15 Ir. Ch. R. 445); though, where the statute has already run, the tenant for life cannot by acknowledgment revive a charge or arrears of interest against the remaindermen. (*Gregson v. Hindley*, 1846, 10 Jur. 383; *Smith v. Smith*, *supra*; *Becher v. Delacour*, 1881, 11 L. R. Ir. 187.)

Title not
revived by
acknow-
ledgment.

The effect of an acknowledgment is not to secure the title of the owner, by rendering the possession non-adverse, but merely to give a new starting-point for the statute, which at once commences to run afresh. (*Scott v. Nixon*, 1843, 3 Dr. & War. p. 404; cf. *Burroughs v. M'Creight*, 1844, 1 Jo. & Lat. p. 304.) But when the statute has run, so that the title of the true owner is extinguished

under sect. 34, no subsequent acknowledgment will revive it. (*Sanders v. Sanders*, 1881, 19 Ch. D. 373, overruling *Stansfield v. Hobson*, 1853, 3 D. M. & G. 620.) That section applies generally to land and rent, and therefore to the case of a mortgagee in possession. The mortgagor's title is liable to be extinguished, and the case is within *Sanders v. Sanders*.

But in respect of sums of money charged on land, sect. 8 of the Act of 1874, like sect. 40 of the Act of 1833, suspends the remedy only, leaving the right unaffected, and it has been held that an acknowledgment is effectual if made at any time before action brought. (*Harty v. Davis*, 1850, 13 Ir. L. R. 23.) In *Toft v. Stephenson* (1851, 1 D. M. & G. 28), also, where an acknowledgment was held to be effectual, more than twenty years had elapsed before the acknowledgment was given, but attention was not directed to the point, and the case can hardly be treated as an authority upon it. The principle breaks down, however, when it comes to be applied to the case of acknowledgment by a tenant for life (*Becher v. Delacour*, *supra*), and the matter cannot be regarded as altogether settled.

Except, perhaps, as to sums of money charged on land.

2. Part Payment.

When the statute is running against a mortgagee, or against the right to receive a sum of money charged on land, it may be checked by a payment made on account either of principal or interest. Under 1 Vict. c. 28, as modified by sect. 9 of the Real Property Limitation Act, 1874, the mortgagee may enter or bring an action at any time within twelve years "after the last payment of any part of the principal money or interest" secured by the mortgage; and sect. 8 of the Act of 1874, in fixing the period within which proceedings must be taken to

Statutory provisions.

recover sums of money charged on land, continues, "unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent." With this last enactment it is useful to compare sect. 5 of 3 & 4 Will. IV. c. 42, which provides, as to specialty debts, that "if any acknowledgment shall have been made, either by writing signed by the party liable" by virtue of the specialty, "or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon," an action may be brought within twenty years after such acknowledgment or part payment or part satisfaction. In the case of simple contract debts, part payment is only important so far as a fresh promise to pay can be implied from it.

By whom
payment
may be
made.

The statute 1 Vict. c. 28 speaks of payment simply, without in any way specifying by whom it may be made. On sect. 40 of the Real Property Limitation Act, 1833 (and sect. 8 of the Act of 1874), it is not clear whether the words "by the person by whom the same shall be payable or his agent," apply only to acknowledgment or also to payment. In *Chinnery v. Evans* (1864, 11 H. L. C. p. 134), Lord Westbury, C., treated them as applying to both cases; but in *Harlock v. Ashberry* (1882, 19 Ch. D. 539) the Court of Appeal regarded the former case as proceeding on the view that they applied to acknowledgments only, and this appears to be the more natural construction. (Cf. *Homan v. Andrews*, 1850, 1 Ir. Ch. R. p. 112.) So in sect. 5 of 3 & 4 Will. IV. c. 42, the person by whom the payment is to be made is not defined. (*Roddam v. Morley*, 1857, 1 De G. & J. p. 6.) But the last-mentioned statute requires that the part payment shall be an acknowledgment (*Whitley*

v. *Lowe*, 1858, 2 De G. & J. p. 712), and in *Harlock v. Ashberry* (*supra*), Jessel, M.R., laid it down as a general principle, applicable to all Statutes of Limitations, that the payment must be by a person liable as an acknowledgment of right. The question was much discussed in *Levin v. Wilson* (1886, 11 App. Cas. 639), and it was held that a payment was sufficient if "made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeasance or redemption of the mortgage." But in that case the person who made the payment, while only entitled, and not liable, to pay under the mortgage deed, was liable to pay under a collateral bond. And personal liability is not required. It is sufficient that the person making the payment is liable in default of payment to lose the land. (Cf. *Forsyth v. Bristowe*, 1853, 8 Ex. 716.) In this respect the principle is the same as in the case of acknowledgment. (*Supra*, p. 248.) Similarly, under sect. 5 of 3 & 4 Will. IV. c. 42, the payment may be made by any person interested to make it. (*Roddam v. Morley*, 1857, 1 De G. & J. p. 18; *Coope v. Cresswell*, 1866, L. R. 2 Ch. p. 124; *Pears v. Laing*, 1874, L. R. 12 Eq. p. 54.) It appears, then, that under each of the statutes the payment may be made by any person who is liable, or entitled, or interested, to pay.

On the other hand, payment by a stranger is not sufficient (*Chinnery v. Evans*, 1864, 11 H. L. C. p. 133); and although, if a tenant pays his rent to the mortgagee, such rent will go in satisfaction of the principal or interest of the mortgage debt, yet the tenant is not a person liable under the mortgage, so as to make his payment effectual to check the operation of the statute. (*Harlock v. Ashberry*, *supra*; cf. *Cockburn v. Edwards*, 1881, 18 Ch. D. p. 457; *Re Frisby*, 1889, 43 Ch. D. 106.)

Payment
by stran-
ger.

Payment
by agent.

A payment may also be made by the agent of the person liable, and a receiver appointed by the Court is regarded as such agent (*Chinnery v. Evans*, 1864, 11 H. L. C. p. 134; *Cronin v. Dennehy*, 1869, Ir. R. 3 C. L. 289), provided the payment is authorized by the order appointing him. (*Whitley v. Lowe*, 1858, 25 Beav. 421; on appeal, 2 De G. & J. 704.) But where a mortgagee relies upon payment by an agent of the mortgagor, it is necessary to ascertain from time to time that the agency is in fact continuing. (*Newbould v. Smith*, 1886, 33 Ch. D. 127.)

Persons
against
whom
payment
is effec-
tual.

The extent to which payment is effectual is a matter of considerable difficulty. It has been suggested, in an article by Mr. Millidge, in the *Law Quarterly Review* (Vol. VII. p. 43), that since payment, to exclude the statute, must be made as an admission of right, it ought to be effectual only as against the person making it; and, in particular, that a person not in possession of land ought not to be able by payment to keep up a charge against the land. But although the authorities contain traces of this doctrine, it does not seem to have prevailed to any considerable extent. It clearly fails in the case of payment by a limited owner, though here it may be said that, inasmuch as the limited owner represents the whole fee for the time being, payments by him ought to bind all persons interested in the land. But it also fails in other cases where there is no such special ground for excluding it. A mortgagee who has assigned the equity of redemption may, by payment, keep up the mortgage against the land (*Chinnery v. Evans*, 1864, 11 H. L. C. 115); so may a person who has never had any interest in the land, but is entitled to make payments on account of the mortgage debt (*Levin v. Wilson*, 1886, 11 App. Cas. 639); and conversely payment of interest by a mortgagor will keep the personal

remedy alive against a surety. (*Re Frisby*, 1889, 43 Ch. D. 106.)

The question affects the title to land in two cases, (1) where there is an actual charge upon the land; and (2) where there are debts of a deceased owner, whether by specialty or simple contract, for which the land may be made liable. The first case depends on the construction of 1 Vict. c. 28, and sect. 8 of the Real Property Limitation Act, 1874; the second on 3 & 4 Will. IV. c. 42, s. 5, and on the law relating to simple contract debts.

(1.) *Existing Charges.*

It is well settled that payment by a tenant for life, or other limited owner in present enjoyment of the land, keeps a charge alive against the land so as to bind all persons in remainder. (*Barclay v. Owen*, 1889, 60 L. T. 220.) An acknowledgment, as already stated, has this effect, and a part payment is said to be more effectual than an acknowledgment. It relieves from liability other persons who are liable to make the payment (*Coope v. Cresswell*, 1866, L. R. 2 Ch. p. 124); and moreover, in the case of a limited owner, it is his duty to keep down the interest. (*Re Fitzmaurices*, 1864, 15 Ir. Ch. R. p. 461.) Hence the statute does not run against a charge when the tenant for life is himself the owner of the charge (*Burrell v. Earl of Egremont*, 1843, 7 Beav. 205), for, being in receipt of the rents and profits, he is deemed to pay himself the interest of the charge, and this is a sufficient payment to save the bar of the statute. And the principle applies whenever the same person is beneficially entitled to the land and the charge, although the legal right to receive the interest and the legal liability to pay may be vested in different persons as trustees. (*Topham v. Booth*, 1887, 35 Ch. D. 607.)

Payment
by person
not in pos-
session.

A limited owner, as already observed, represents for the time being the whole estate, and if he could not make a payment which would be effectual against the remaindermen, the mortgagee would have no resource but to realize his security at once. It is otherwise where there are different persons at the same time liable to pay, whether directly, as being bound by the mortgage contract, or indirectly, as being in possession of the mortgaged land; and it is a question of greater difficulty whether payment by one should be allowed to affect the others. A mortgagor may be out of possession of land in two cases. He may be kept out of possession by a stranger in whose favour the statute is running; or he may have assigned the equity of redemption. In the first case—where the mortgagor is simply out of possession—it is settled that he can make a good payment to the mortgagee under 1 Vict. c. 28, so as to preserve the right of the latter against the land. (*Doe v. Eyre*, 1851, 17 Q. B. p. 371; *Doe v. Massey*, 1851, 17 Q. B. 373.)

Payment
by mort-
gagor
after as-
signment
of equity
of redemp-
tion.

As to the second case, it seems to have been assumed by the Court of Appeal, in *Newbould v. Smith* (1886, 33 Ch. D. 127)—the point was not determined when the case was before the House of Lords (1889, 14 App. Cas. 423)—that payment by a mortgagor who had parted with his interest in the land would not be effectual against the present owners of the land; but it does not appear to have been noticed that the point had been already decided in an opposite sense by the House of Lords in *Chinnery v. Evans* (1864, 11 H. L. C. 115.) In the latter case a mortgage was made in 1776 on estates X., Y., and Z. In 1784 a receiver was appointed on the petition of the mortgagee. Estate Z. was sold by the mortgagor before, and estate X. after, the appointment of the receiver, but in neither case was the purchaser aware of the mortgage.

The receiver applied the rents of the Y. estate in keeping down the interest on the mortgage. It was held that the receiver was the agent of the mortgagor, and that his payments were effectual to keep the mortgage alive against estates X. and Z. It is true that here the mortgagor retained part of the land subject to the mortgage, but this seems to furnish no sufficient ground for distinguishing the case from *Newbould v. Smith*. The judgments of Lord Westbury, C., and Lord Cranworth, were both based on the principle that the mortgagor is entitled to make payments on account of the mortgage, and so long as he duly makes them, the mortgagee is not bound to inquire how he is dealing with the equity of redemption; and the principle applies equally whether the mortgagor assigns the equity of redemption in the whole or in part only of the land subject to the mortgage.

The principle that a person not in possession of land can make a payment on account of a mortgage which will effectually keep the mortgage on foot against the land, was applied also in *Levin v. Wilson* (1886, 11 App. Cas. 639). In that case the payment was made by a surety for the mortgagor, who was entitled to pay under the mortgage deed, personal liability to pay being imposed on him by a collateral bond. Conversely, payment by a mortgagor in possession will keep up the personal remedy against the surety. (*Re Frisby*, 1889, 43 Ch. D. 106.) None of the above cases, except *Newbould v. Smith*, recognize the doctrine that payment, being an admission of right, is effectual only against the person who makes it. On the contrary, they proceed upon the principle that a payment, if made by a person entitled to make it, and not by a mere stranger, so as to be effectual to keep the mortgage alive at all, is effectual to keep it alive for all purposes.

In this respect payment, though sometimes said to

Effect of
payment
not con-
fined to
person
making it.

Distinction

between
payment
and ac-
knowledg-
ment.

operate only as an admission (*Harlock v. Ashberry*, 1882, 19 Ch. D. 539), differs from an acknowledgment, the latter, in general, being effectual only as against the person making it. And the difference corresponds to a substantial distinction between payment and acknowledgment as regards the person whose title is thus recognized. Payment of interest puts the mortgagee in full enjoyment of his bargain—in possession of the mortgage, so to speak—and he is not put upon any further assertion of his rights; acknowledgment has no such result. (*Lewin v. Wilson*, 1886, 11 App. Cas. p. 645; *Bolding v. Lane*, 1863, 1 D. J. & S. 122.)

Devolu-
tion of
liability on
death of
mort-
gagor.

Where the mortgagor has died, so that the personal liability has devolved on his executors, and the liability in respect of the land on his heir or devisees, there seems to be no reason to doubt, upon the above principles, that payment by the executors will keep alive the remedy against the land, and *vice versâ*; but in *Dickenson v. Teasdale* (1862, 1 D. J. & S. 52), where a testator charged half his debts on a certain part of the X. estate, which he devised to A., and half on the rest of the same estate, which he devised to B., and also charged his debts generally on all his real estate, Lord Westbury, C., held that payments by A. did not keep the charge alive against B. Considering, however, that A.'s land was liable to be taken to satisfy the debts charged on B.'s land, the decision is not, perhaps, consistent with the other cases as to the effect of payment.

(2.) *Specialty and Simple Contract Debts.*

Debts re-
coverable
out of
lands of
debtor
after his
decease.

Under 1 Will. IV. c. 47, all debts by specialty, in which the heirs are bound, can be recovered against the heir or devisee to the extent of the value of the land taken by him; and by 3 & 4 Will. IV. c. 104, all the lands of a deceased person are made assets in equity for the payment

of both specialty and simple contract debts. Hence, under these statutes, any land of a deceased person can be made liable for his debts, provided it has not been *bonâ fide* aliened for value (*British Mutual Investment Co. v. Smart*, 1875, L. R. 10 Ch. 567); and it is necessary, therefore, to consider how this liability can be kept alive by payment. A distinction must be made between specialty and simple contract debts, for a mere admission of liability is sufficient to preserve the former; a promise to pay, either express or implied, is required as to the latter. (Cf. *Roddam v. Morley*, 1857, 1 De G. & J. p. 15.)

There is some doubt as to the effect of payment on a specialty debt in consequence of the conflict between the principle recognized in *Roddam v. Morley* (1857, 1 De G. & J. 1), and the decision of Lord Chelmsford, C., in *Coope v. Cresswell* (1866, L. R. 2 Ch. 112). *Roddam v. Morley* went on the principle that payment of interest on a specialty debt by any person under a liability to pay sets free the action on the specialty generally, and not only as against the person paying. "I have come to the conclusion," said Lord Cranworth, C. (1 De G. & J. p. 19), agreeing with the opinion previously expressed by Williams and Crowder, JJ., "that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty." For the purpose of the case, it was only necessary to decide that payment by a devisee for life was effectual as against the devisees in remainder. (Cf. *Dibb v. Walker*, (1893) 2 Ch. 429.) But the decision proceeded upon the ground that the statute 3 & 4 Will. IV. c. 42, s. 5, in preserving the creditor's action in cases of payment, imposes no restriction on the persons against whom the

Specialty
debts.

*Roddam v.
Morley.*

action can be brought—as just stated, it sets free the action generally; and the reasoning applies to the case of payment by one of several persons simultaneously entitled just as much as to the case of several persons successively entitled.

*Coope v.
Cresswell.*

In *Coope v. Cresswell* (*supra*), on the other hand, Lord Chelmsford took the view that the effect of payment is ordinarily limited to saving the creditor's right as against the person paying. "Is there," he asked (p. 125), "anything unreasonable in supposing that the [Legislature] intended what their words literally express? and that in each case of an action brought, you are to look to the party whose liability is sought to be enforced, and who uses the Statute of Limitations as a defence? The whole frame of the section appears to point in this direction." He restricted, therefore, the effect of *Roddam v. Morley* to the case there in question, of payment by a limited owner, and, as already stated, there are special reasons why such a payment should bind the persons interested in remainder. Possibly, also, Lord Chelmsford would have allowed the payment of one of several joint obligors or covenantors to be effectual against the rest, so far as the statute in question is concerned. But he declined to apply this principle to "the case of persons whose respective liabilities stand upon such totally different grounds as a devisee simply, a devisee for payment of debts, and a personal representative." (*Ibid.*, p. 124.) Consequently he held that payment by persons who were at once personal representatives of a testator, and trustees for payment of debts, was not effectual to keep up a specialty debt of the testator against a beneficial devisee.

Probably
payment
sets free
the action
generally.

To go further into the grounds of the judgments in *Roddam v. Morley* and *Coope v. Cresswell* would require a minute examination of the language of 3 & 4 Will. IV. c. 42, s. 5, such as would be beyond the scope of the

present work; but it seems the better opinion that *Roddam v. Morley* is correct, and that the effect of payment is to set free the action generally. In *Pears v. Laing* (1871, L. R. 12 Eq. 41), Bacon, V.-C., followed it in preference to *Coope v. Cresswell*, and he held that payment by the equitable devisee for life of the X. estate of a testator, of interest on a mortgage created by him on the Y. estate, with the usual covenant for payment, kept the mortgage debt alive against the general estate of the testator. (Cf. *Blake v. Gale*, 1883, 22 Ch. D. 820.) Moreover, the principle of *Roddam v. Morley* is in accordance with the rule already stated as to the effect of payment of interest in the case of mortgages. Payment of interest insures the continuance of the debt for all purposes; it does not operate simply as an admission of liability on the part of the person paying.

In the case of simple contract debts, different considerations arise. There is here no statutory provision as to payment, and it is only effectual as evidence of a new promise to pay the debt. In *Re Hollingshead* (1888, 37 Ch. D. 651), where Chitty, J., held that payment of interest on a simple contract debt of a testator by the devisee for life of real estate kept up the debt against the remainderman, too little attention seems to have been given to this distinction. It is difficult from payment by a tenant for life to imply an actual promise on the part of the remainderman, and there is no hardship, in the case of a simple contract debt, in requiring the creditor to pursue his remedies promptly. In the case of joint debtors, it was formerly possible to make payment by one evidence of a promise to pay on the part of the rest by regarding the one who paid as the agent of the rest. (*Whitcomb v. Whiting*, 1781, Doug. 652; 1 Sm. L. C. 9th edit. 618.) But this rule, which has been abolished

Simple
contract
debts.

by sect. 14 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), was not extended to the case where a joint contract had been severed by death (*Atkins v. Tredgold*, 1823, 2 B. & C. 23; *Slater v. Lawson*, 1830, 1 B. & Ad. 396); and accordingly, the executors of one co-contractor were not bound by payments made by the other. Still less could it apply where there was no original joint contract, but the sole liability of a testator became enforceable upon his death against several, either directly as his executors, or indirectly as sharing in his property. Hence, payment by an executor does not keep the debt alive against the real estate, nor, on the other hand, does payment by the heir or devisee keep it alive against the executor. (*Putnam v. Bates*, 1826, 3 Russ. 188; *Fordham v. Wallis*, 1852, 10 Hare, 217; *Boatwright v. Boatwright*, 1873, 17 Eq. 71.) It may be noticed that sect. 14 of the Mercantile Law Amendment Act, 1856, does not seem to apply to liabilities of this kind which are simultaneous merely, and not joint.

3. *Re-entry.*

Entry and
continual
claim
under old
law.

Under the old law a merely formal entry by the person entitled was sufficient to vest the possession in him, or, if he dared not enter for fear of injury, the same result was attained by his going as near the land as he dared, and making his claim. (Co. Litt. 253 b.) Continual claim, as this was called, had to be made within every year and day. Originally, an entry gave a new starting-point for the running of the statute; but 4 & 5 Anne, c. 16, s. 16, enacted that no entry should be of force to avoid a fine, or should be a sufficient entry within the statute 21 Jac. I. c. 16, unless an action was commenced within a year and prosecuted with effect. Upon this state of the law the Real Property Commissioners observed (First Report,

p. 41):—"We think that continual claim, by which rights of entry may be kept alive beyond the twenty years, should be abolished; and that, within that time, the claimant must either redress his wrong by his own act, in availing himself of an opportunity to take peaceable possession, or he must call in the aid of law by commencing his action. We are of opinion that nominal entries on land which do not change the possession should be of no avail to the claimant in extending the period of limitation. By 4 & 5 Anne, c. 16, s. 16, an action may be commenced for the recovery of land within one year next after making an entry upon it, or claiming it with due solemnity. But an entry without change of possession is generally a secret act; great doubts may arise respecting the proof of it in point of fact, and also as to what amounts to such an entry in point of law; and it seems better for both parties to require that, within the prescribed period, either possession shall be openly taken by the claimant, upon which an action of trespass may immediately be brought against him; or, if he cannot obtain possession, that he should commence an action of ejectment to try the right."

In pursuance of these suggestions, the doctrine of mere entry and continual claim was abolished by the Real Property Limitation Act, 1833. Sect. 10 enacted that no person should be deemed to have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon; and sect. 11, that no continual or other claim upon or near any land should preserve any right of making an entry or distress or of bringing an action. The result is that an entry, to vest the possession in the person entering and prevent the bar of the statute, must be effective as opposed to merely formal. "The making an entry amounts to nothing unless something is done to divest the possession out of

Merely
formal
entry no
longer
sufficient.

the tenant, and re-vest it in fact in the lord." (*Doe v. Coombes*, 1850, 9 C. B. p. 718.)

Effectual
re-entry.

This is done most effectually if the occupier is actually put out of possession. In *Randall v. Stevens* (1853, 2 E. & B. 641), the overseers of a parish entered upon a pauper who had been let into possession of a cottage, turned out himself and his family, and removed nearly the whole of his furniture. On the same day he resumed possession, but it was held that possession had been taken by the overseers, and that the statute had been checked. If, however, the occupier remains on the land or in the house, it is necessary that the owner should, by the exercise of substantial acts of ownership, demonstrate his own possession, and merely formal acts intended to assert his right are not sufficient. In *Doe v. Coombes* (*supra*), Coombes had encroached on the waste of a manor, and had built himself a hut. In 1835, the encroachment having been presented at the lord's court, the lord of the manor, accompanied by the steward, went to the premises, and, finding Coombes' wife and family there, they entered. The lord stated that he took possession, and directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. This was done without any objection being made, and the lord and the steward then retired. It was held that this was no more than a mere entry, and that it was not sufficient to vest the possession in the lord. (Cf. *Thorp v. Facey*, 1866, 35 L. J. C. P. 349; *The King v. Inhabitants of Wooburn*, 1830, 10 B. & C. 846.)

Worssam
v. Vanden-
brande.

In *Worssam v. Vandenbrande* (1868, 17 W. R. 53), the facts were as follows:—Over twenty years before the action the defendant had entered into possession of land, and had enclosed it with a fence. Between nineteen and twenty years before the action the predecessors in title of

the plaintiffs went to the land, broke down the fence, and erected a post with the announcement that applications for a lease of the land were to be made to them. They remained on the land three quarters of an hour. Three days later the post was gone, but there was no evidence to show who had removed it. For the next five years no one, so far as appeared, did anything on the land, and then the defendant re-entered and built upon it. It was held that the plaintiffs' predecessors had effectively resumed possession, and that the defendant had not gained a title.

So soon as there has been a dispossession of the true owner, the statute runs against him and in favour of the new possessor. But that the true owner is merely out of possession is not enough; there must be a person in possession who can benefit by the operation of the statute. Hence, as shown above (*ante*, p. 195), there is no discontinuance of possession within the meaning of sect. 3 of the Real Property Limitation Act, 1833, unless the old possessor has both quitted possession, and another person has obtained possession. The same principle has been held to apply in regard to the continuance of the operation of the statute. As it does not begin to run until there is an adverse possession, so it does not continue to run unless there continues to be an adverse possession. In other words, the statute ceases to operate so soon as the adverse possessor goes out of possession.

On the literal construction of sect. 3 of the Real Property Limitation Act, 1833, it is not clear how this result follows. The statute is to run from dispossession, and it might well have been held that it continues to run until the owner actually re-enters and vests the possession once more in himself. But actual re-entry is not required. It was decided in *Trustees' Agency Co. v. Short* (1888, 13

Constructive re-entry.

Trustees' Agency Co. v. Short.

App. Cas. 793) that so soon as the adverse possessor quits possession, the true owner is in the same position in all respects as he was before the intrusion took place. (*Ante*, p. 62.) This must mean that he is in the same position for legal purposes. In other words, although he is not in actual possession again, yet the civil possession is vested in him. The statute, therefore, is checked, not only when the owner by re-entry resumes the actual possession, but also when, upon abandonment by the adverse possessor, he regains the civil possession. It may be said that in such a case there is a constructive re-entry.

4. *Commencement of Action.*

Issue and
renewal of
writ.

At any time before the statutory period has expired the claimant may institute legal proceedings for the recovery of the land or of a sum of money charged on the land, and, thereupon, for the purpose of such proceedings, the statute ceases to run. If the proceedings are commenced by writ, the writ is in force for only twelve months from the date thereof; but, if the defendant has not been served, the plaintiff may, within the twelve months, obtain from the Court or a judge a renewal of the writ for six months, and so on from time to time, if he can satisfy the Court or the judge that reasonable efforts have been made to serve the defendant, or that other good reason for the renewal exists. (R. S. C. 1883, Ord. VIII. r. 1.) The rule provides that a writ of summons so renewed remains in force, and is available to prevent the operation of the Statute of Limitations, and for all other purposes, from the date of the original writ. But to prevent the bar of the statute the renewed writ must be strictly a continuance of the original writ (*Pratt v. Hawkins*, 1846, 15 M. & W. 399); and hence it was held in *Manby v. Manby* (1876, 3 Ch. D. 101), that if, during the currency of a writ issued in one division

of the High Court, the statute has run, the plaintiff is not at liberty to issue a writ in another division.

And although, under the Rules of the Supreme Court, 1883, Ord. LXIV. r. 7, the time for doing any act or taking any proceeding may be enlarged by the Court or a judge, no extension of the periods of twelve and six months for renewing a writ will be granted after the statute has run (*Doyle v. Kaufman*, 1877, 3 Q. B. D. 340; *Hewett v. Barr*, (1891) 1 Q. B. 98); save possibly under very exceptional circumstances. (Per Kay, L.J., in *Hewett v. Barr*.) So, too, although the Court has a general power of allowing amendments, it will not exercise the power in such a manner as to enable the plaintiff to set up fresh claims in respect of causes of action which have been barred since the issue of the writ. (*Weldon v. Neal*, 1887, 19 Q. B. D. 391; cf. *Hudson v. Ferneyhough*, 1890, 34 Sol. Journ. 228.) Where, however, a writ had been renewed because the address of the defendant was not known, and it was ultimately found that he was residing out of the jurisdiction, the plaintiff was allowed to issue a concurrent writ for service out of the jurisdiction, although the statute had run. (*Smalpage v. Tonge*, 1886, 17 Q. B. D. 644.)

No enlargement of time allowed.

The old rule that an administration action instituted by one creditor on behalf of the rest saved the statute in favour of all who came in to prove their claims under the decree (*Sterndale v. Hankinson*, 1827, 1 Sim. 393) apparently does not now exist. (*Re Greaves*, 1881, 18 Ch. D. 551.) An order for sale obtained on the petition of an owner out of possession does not prevent the operation of the statute in favour of an occupier who is no party to the proceedings (*Re Taaffe's Estate*, 1878, 1 L. R. Ir. 387); but the lodging of the petition may make the Court a trustee of the proceeds of sale for the parties entitled, so as to prevent the claim of any one of them from being barred. (*Re*

Special proceedings.

Colclough, 1858, 8 Ir. Ch. R. 330.) The doctrine, however, only applies to interests which are to be satisfied out of the proceeds of sale; not to an interest, like a tithe rentcharge, subject to which the sale is made. (*Re Wade's Estate*, 1884, 13 L. R. Ir. 515.)

Appoint-
ment of
receiver.

And the mere appointment of a receiver by the Court does not interfere with the operation of the statute. Regard must be paid to the state of the possession at the time, and to the person in whose interest the receiver is appointed. (*Anon.*, 2 Atk. 15, case 14.) If he is appointed on behalf of a person in possession, the character of the possession remains unchanged, and time still runs against a stranger to the suit. (*Harrison v. Duignan*, 1842, 2 Dr. & War. 295.) So where the receiver is appointed at the instance of creditors of the possessor, the possession of the receiver, so far from interfering with his possession, rather affirms it, for the receiver is only appointed on the ground that the debtor has the *jus possessionis*. Hence, during the receiver's possession, the statute continues to run in favour of the debtor. (*Groom v. Blake*, 1858, 8 Ir. C. L. R. 428; cf. *Re Butler's Estate*, 1863, 13 Ir. Ch. R. 453.) On the other hand, if a receiver appointed by the Court in an action recovers possession against a stranger to the action, such recovery effectually checks the statute if it was running at the time in favour of the stranger. (*Wrixon v. Vize*, 1842, 3 Dr. & War. p. 123.)

VI. THE NEW TITLE.

Possessory
title
during the
currency
of the
statute.

The nature of a possessory title which has not been perfected by the statute depends upon considerations which have already been referred to in discussing the action of ejectment. When the possessor, in whose favour the statute is running, is a disseisor, there can be no doubt

as to the quality of his title. If there is a particular estate in the land, and he enters claiming only such particular estate in opposition to the person entitled, he is seised of the particular estate. (Prest. Abstr. II. 293.) But otherwise, since he cannot qualify his own wrong (Co. Litt. 271a), he gains an estate in fee, and he has consequently an interest which he can alienate or devise (*Asher v. Whitlock*, 1865, L. R. 1 Q. B. 1), and which, if not devised, will descend to his heir-at-law. Against all the world, except the true owner, he and persons claiming under him rank as owners.

But it is probably not necessary to determine whether there has been a technical disseisin. Whenever a person enters into possession without title, whether he is strictly a disseisor or not, he gains thereby a right of possession, or a possessory title, which ranks as an interest in the land, and in virtue of which he can, if dispossessed, recover in ejectment. (*Ante*, p. 123.) Ordinarily it is treated as a freehold interest, and it will descend to his heir. (*Doe v. Jauncey*, 1837, 8 C. & P. 99.) But if he has entered in a character which shows clearly that he has no seisin, but only possession—if, for instance, he claims an existing term (cf. Prest. Abstr. II. 295)—his possessory title is probably qualified accordingly, and devolves as personalty. Under such circumstances the statute does not run in his favour against the freeholder, but only against the person really entitled to possession under the lease.

Title by
wrongful
entry.

It is submitted that, under the Real Property Limitation Acts, the same rule applies in the case where a person enters with title, and then holds over after his title has expired. Under the strict rules of seisin, he is no disseisor. As against the freeholder he is only tenant at sufferance. But the statute runs in his favour, and he has a possessory right

Title by
holding
over.

which may be said to give him a *quasi*-seisin; in other words, which makes him freeholder as against strangers. The same principle seems to apply in the case of a tenant at will, whose tenancy is deemed for the purpose of the statute to expire at the end of a year. In point of fact, he continues to hold after that period as tenant at will, and in strictness he has no interest which will descend to his heir. But it may be argued that, in addition to his title as tenant at will, he has a possessory title under the statute, exactly as if he were holding over as tenant at sufferance; and that this possessory title is capable of descent, or devise. No such question arises when a person entitled to an estate in fee determinable on breach of a condition is allowed to continue in possession after condition broken, and he clearly has an interest which he can devise. (*Clarke v. Clarke*, 1868, 2 Ir. R. C. L. 395.)

Extinguishment
of old title.

When the statutory period has elapsed, a new factor is introduced into the case by reason of the extinguishment of the old title. Under the former Statutes of Limitations the lapse of time barred the remedy of the true owner, but did not directly affect his title. The present rule is contained in sect. 34 of the R. P. L. Act, 1833, which enacts that at the determination of the period limited to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, action, or suit might have been made or brought within such period, shall be extinguished. Hence, since the old title is absolutely extinguished, nothing passes under a conveyance made by the person formerly entitled (cf. *Kennedy v. Woods*, 1867, 2 Ir. R. C. L. 436); nor is it possible for it to be revived by re-entry (*Brassington v. Llewellyn*, 1858, 27 L. J. Ex. 297; *Bryan v. Cowdal*, 1873, 21 W. R. 693), by surrender of possession (cf. *Jack v. Walsh*, 1842, 4 Ir.

L. R. 254), or by acknowledgment under sect. 14. As to acknowledgment, an opposite decision was given in *Stansfield v. Hobson* (1853, 3 D. M. & G. 620), but this was overruled by the Court of Appeal in *Sanders v. Sanders* (1881, 19 Ch. D. 378). In *Hanks v. Palling* (1856, 6 E. & B. 659), the question was raised, but not decided, whether a rent-charge could be revived by payment after non-payment for the statutory period, but it seems clear that it could not. The title to the rent is absolutely extinguished in the same way as title to land. Sect. 34, however, does not apply to charges on land.

It has been said that the effect of the statute is “to make a parliamentary conveyance of the land to the person in possession” after the period of twelve years has elapsed. (Per Parke, B., in *Doe v. Sumner*, 1845, 14 M. & W. 39; cf. *Scott v. Nixon*, 1843, 2 Con. & L. p. 194; *Incorp. Society v. Richards*, 1841, 1 Dr. & War. p. 289; *Burroughs v. McCreight*, 1844, 1 Jo. & Lat. p. 303; *Dawkins v. Lord Penrhyn*, 1877, 6 Ch. D. 323.) But this is incorrect. There is no conveyance or transfer of the old title. (Cf. Hayes’ *Conveyancing*, I. p. 269.) This is extinguished, and in its place there is a new title free from the limitations and burdens which affected the old one. Hence no way of necessity can be claimed against the new possessor, for such a way arises only upon a grant (*Wilkes v. Greenway*, 1890, 34 Sol. Journ. 673); and, similarly, where the title of a lessee is barred by adverse possession during the currency of the lease, the lease cannot be treated as assigned to the possessor so as to render him liable on the covenants. (*Tichborne v. Weir*, 1892, 67 L. T. 735.) The new estate is also free from any trusts which affected the old, though in certain cases the interests of *cestui que trusts* may perhaps be preserved on equitable grounds. (*Ante*, p. 222.) The possessor gets,

therefore, a perfect title, and, provided it is clear that the statute has in fact run, it is a title which can be forced on a purchaser. (*Scott v. Nixon*, 1843, 2 Con. & L. 185.)

Nature of
the new
title.

The nature of the possessory title after it has been perfected by lapse of time is readily understood from what has been said as to its nature during the currency of the statute. If there has been a disseisin of the true owner, his estate is turned to a right of entry, and the fee is already vested in the disseisor. The only effect of the statute is to extinguish this right of entry, and to change the disseisor's estate from a defeasible to an absolute estate. But otherwise his estate is not affected by the expiration of the statutory period. He was seised in fee before, and he is seised in fee still. If, on the other hand, the possessor, although the statute is running in his favour, is no disseisor—where, for instance, he is tenant at sufferance or tenant at will—the statute has a greater effect, and at the end of the statutory period the possession is at once clothed with seisin. There is no longer any estate vested in the former owner, and since the freehold cannot be supposed to be vacant, the possessor necessarily becomes seised in fee. (Cf. *ante*, p. 119.) If two or more persons are in possession they acquire a title in joint tenancy, with the ordinary result that, on the death of one, his share goes to the other or others by survivorship. (*Ward v. Ward*, 1871, L. R. 6 Ch. 789; *Bolling v. Hobday*, 1882, 31 W. R. 9.)

Acquisition
of
leasehold
interest.

It has been assumed in the above remarks that the statute is running against the freeholder, and on the extinction of his interest, accordingly, a freehold estate is vested in the possessor. But where the land is subject to a term, and a stranger enters, so that the statute runs only against the lessee, it has been suggested that the new title will be of the same nature as that which is extinguished (*Darby & Bosanquet*, 2nd ed. 494); and the

suggestion was approved in *Rankin v. M'Murtry* (1889, 24 L. R. Ir. p. 297). But this opinion does not notice whether the ouster of the lessee is a disseisin also of the freeholder. It is true that the statute does not run against the freeholder until the expiration of the term; but nevertheless the freeholder may be disseised (*ante*, p. 51), and, if this has taken place, a freehold title is vested in the disseisor. If, on the other hand, a stranger on entering recognizes the freehold title and claims the term only, this is an ouster of the lessee, but no disseisin of the freeholder (*Prest. Abstr.* II. 295), and the stranger gains no more than a leasehold interest.

So far as to the case where, for the whole of the statutory period, possession is held by the first adverse possessor, or by persons claiming through him. There is no doubt that the old title is extinguished, and that the possessory title becomes indefeasible. (*Keefe v. Kirby*, 1857, 6 Ir. C. L. R. p. 594.) But it may be that possession is held by different possessors claiming adversely to each other, and then it has been sometimes thought that there is a difficulty in determining in whom the title is vested when the statute has run. (*Doe v. Barnard*, 1849, 13 Q. B. 945.) Clearly, however, there is no difficulty in the case of successive disseisors. The title of each, until in turn barred by the statute, is good against all the subsequent disseisors. Thus, suppose A. to be the true owner, and B., C., D., and E. successive disseisors, E. being in possession when the statute has run against A. There is no ground for saying that E. can thereupon keep the land against all the world. Before A.'s title was gone, B. had a right of entry on E., and this right he has equally afterwards. So with C. and D. It is only when the statute has barred in succession B., C., and D., that E. is safe. (Cf. *Dart's Vendors and Purchasers*, 6th ed., 463.)

Successive
possession-
sors :

i. Where
all are
disseisors.

ii. Where
all are not
disseisors.

But the successive possessors, in whose favour, during their respective possessions, the statute is running, may not all be disseisors. Suppose, for example, A. to be true owner, and B. his tenant at will. At the end of a year the statute begins to run in favour of B. though he is no disseisor. When it has been running for six years B. dies, leaving C. his heir. D., a stranger, thereupon enters, and remains in possession for the next six years. In strictness, B. had no inheritable interest, and therefore C. took nothing. Usually D. will be a disseisor, and, if so, the estate in fee which vests in him, though defeasible by A.'s entry, becomes absolute on the extinction of A.'s title. But even if D. is not a disseisor, and the fee, notwithstanding his possession, remains vested in A., yet, in the manner already explained, it passes to D. so soon as the statute has run against A. (*Ante*, p. 274.)

These substantially were the facts in *Doe v. Barnard* (1849, 13 Q. B. 945), and it has been suggested above that the actual decision, that D. had no title, was wrong. (*Ante*, p. 118.) It seems to have been supposed (13 Q. B. p. 952) that, although during successive occupations the statute continues to run against the true owner, so that his title is finally extinguished, yet no one else can gain a title because there is not, for the whole time, possession "by the same person or several persons claiming one from the other by descent, will, or conveyance." But there seems to be no ground for allowing the land thus to become derelict. Still assuming that C.'s heir has no interest, it is clear that D. has a title if he is a disseisor (*Asher v. Whitlock*, 1865, L. R. 1 Q. B. 1); while, if he is no disseisor, he at any rate gains the fee on the extinction of A.'s title. (*Ante*, p. 119.)

Probably
disseisin
not
material.

It is possible, however, as already pointed out, that although B. was tenant at will, yet, inasmuch as the

statute was running in his favour, he had as against strangers a possessory title which descended to C.; and, if so, D.'s entry was a violation of C.'s possessory right, and gave C. a right of entry. Although, therefore, A.'s title was extinguished, yet D.'s estate was still defeasible by the entry of C. This view is in accordance with the principle suggested above (*ante*, p. 123), that any possession in favour of which the statute is running is the foundation of a right of possession, an inchoate possessory title, and each of such titles is good as against those subsequent to it. There is thus no need to inquire as to disseisin, but simply as to the operation of the statute. (Cf. Pollock & Wright on Poss. 95.)

In *Dixon v. Gayfere* (1853, 17 Beav. 421), it appears to *Dixon v.*
Gayfere. have been thought that, as between successive trespassers, the last might be entitled to retain possession. "If," said Romilly, M.R., "a series of trespassers, each adverse to one another, and to the rightful owner, take and keep possession of an estate, in succession, for various periods, each less than twenty years, but exceeding in the whole twenty years, in whose favour (if this Court has possession of the estate, as in this case it has) is the right to be declared? Is it to be in favour of that one of the trespassers who has held the estate for the longest period? Is it to be in favour of the first of them? or is it to be in favour of the last of them? The objections to each and every of them obtaining such a declaration appear to me to be insuperable. At law, no doubt, the person possessed of the legal estate would obtain possession, or, if the legal estate could not be shown to be in any one, the last possessor, that is, the person actually in possession, would hold the property; but not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants." (*Ibid.*, p. 430.)

Statement
of the case.

The circumstances of the case which evoked these remarks were as follows. A testatrix died in 1807, having devised real estate to Gayfere and his heirs upon trust to sell, and pay the income to J. G. for life, and on his death to divide the produce among a class. J. G. died in 1816. Henry Gordon thereupon became entitled to one-fourth of the unsold real estate under the will, and another fourth he purchased from the party entitled thereto. Henry Gordon entered into possession, and died on 6th August, 1818. His original fourth he had devised to Henrietta Dutton, and the other fourth descended to C. H. Gordon, an infant. Henrietta Dutton, however, entered into possession of the two fourths—the report does not show what was done as to the other two fourths—and, in December, 1818, sold them to Dunbar, who entered and retained possession till February, 1837, when he died intestate, and without issue. His widow then entered and remained in possession till her death, on the 4th of August, 1838. The heirs of Dunbar were unknown, and in consequence of adverse claims the tenants refused to pay their rents to any one. In 1839, W. Neely and S. Neely, as co-heirs of Dunbar, brought ejectment against the tenants in the name of Gayfere, and recovered possession of part of the premises. In 1842 Gayfere filed his bill against them and C. H. Gordon, to stay the ejectments, and to have the rights of the parties ascertained and declared. In 1843 a receiver was appointed by the Court, and by the direction of the Court further ejectments were brought, and the whole of the property was recovered by 1847. Gayfere became of unsound mind, and his suit was not proceeded with; but subsequently other suits were instituted for the same purpose. C. H. Gordon attained twenty-one in March, 1823, and the ten years allowed for disability would have extended his time for recovering

possession till 1833; but it was unnecessary to have recourse to this period, since the original period of twenty years did not expire till 1838.

It thus appeared that the legal estate was, during the whole time, outstanding in the trustee. The title of C. H. Gordon, the equitable owner, accrued in 1818. Dunbar was in possession—or rather, in receipt of the rents—without title from 1818 till his death, in 1837; then his widow till 1838, apparently without title under him (17 Beav. p. 429); then for four years the tenants withheld their rents; and finally the Court, at the instance of the trustee, took possession. Under these circumstances it had to be decided who had the better title—C. H. Gordon, the original equitable owner, or the heirs of Dunbar, in respect of his adverse possession for nearly nineteen years. It was assumed that, if the statute applied, C. H. Gordon's title was necessarily extinguished. On the other hand, Dunbar had not himself acquired a title by twenty years' possession, and Romilly, M.R., refused to recognize any right in his heirs. "If," he said, "Nathaniel Dunbar had lived till the twenty years had expired, he would undoubtedly have acquired a right against the whole world, because, in order to meet the exigencies of society, the Statute of Limitations has this peculiarity, that it in fact turns a bad title into a good one, provided it has not been interfered with for twenty years. But when the statute converts twenty years' wrongful possession into a right, it requires that that full length of time should have elapsed, as a condition before such conversion." Had the heirs of Dunbar actually obtained possession, it might have been impossible, the Master of the Rolls observed, for C. H. Gordon to recover against them, the effect of sect. 34 being to extinguish his title. But under the peculiar circumstances of the case,

Judgment of
Romilly,
M.R.

Dunbar's heirs never having been in possession, and the Court having taken possession by its receiver, he held that the statute did not apply; and that the Court must ascertain and declare the rights of the parties exactly as if that statute did not exist. Accordingly he declared that C. H. Gordon, or rather, a purchaser from him, was entitled. This declaration extended to an undivided moiety, although the assignee claimed only a fourth. The report would have been more intelligible had it shown what had been done in respect of the moiety which did not vest in Henry Gordon.

Prevalent
view that
decision
was
incorrect.

The decision has usually been regarded as incorrect (*Asher v. Whitlock*, 1865, L. R. 1 Q. B. 1; Dart's Vendors and Purchasers, 6th edit. 465; Pollock & Wright on Possession, 99; Darby and Bosanquet on Stat. of Lim. 2nd edit. 496), and it seems clear that it was improper to put the statute out of consideration. With regard to the passage from the judgment, quoted above, as to the rights *inter se* of successive trespassers, it is probable that the law does not favour the last possessor in the manner there suggested. Each possessor—certainly if he is a disseisor, and probably, too, if he is not—gains at once a possessory title which is good against subsequent possessors, and this he can enforce in ejectment. And the same principle holds although the legal estate is outstanding in a trustee. The statute applies to equitable estates in the same manner as to legal estates. (Cf. Darby & Bosanquet, 2nd edit. 497.) The entry into receipt of C. H. Gordon's share of the rents in 1818, was an equitable disseisin of him (*Cholmondeley v. Clinton*, 1820, 2 Jac. & W. p. 166), using the word in its wide sense to include abatement; and an equitable seisin vested in Mrs. Dutton and afterwards in Dunbar, sufficient to create in the latter an interest which would descend to

his heirs and entitle them to possession. They accordingly were, upon the extinction of C. H. Gordon's title, the only persons entitled, and the trustee, as to the legal estate, and the Court as to the receipt of rents and profits, held for them.

If land held under a possessory title is taken for the purposes of a public undertaking under the Lands Clauses Act, 1845, a question arises as to who is entitled to the purchase-money. It appears that the purchase-money, upon being paid into Court, must be taken as representing the land, and the possessor has the same interest under his possessory title as regards the money that he formerly had as regards the land. If the true owner is already barred, the possessor is at once entitled to the purchase-money (*Ex parte Chamberlain*, 1880, 14 Ch. D. 323); if he is not barred, the possessor must wait until the statute has run, and he can then obtain the money, if no claim on the part of the owner has been made in the meantime. (*Ex parte Winder*, 1877, 6 Ch. D. 696; *Re Evans*, 1873, 42 L. J. Ch: 357.) But if the possessor is entitled to possession at the time the land is taken, though for a determinable estate, and the statute, consequently, is not then running in his favour, he cannot subsequently claim the purchase-money for the fee on the ground that, had the land not been taken, he would have been able to hold over after the termination of his interest and so acquire a title. (*Gedye v. Commissioners of Works*, 1891, 2 Ch. 630.)

Proceeds
of sale.

In deciding when the statute is to be deemed to have run, it is necessary to consider whether a mere twelve years' possession is sufficient, or whether further time must not be allowed for the possible disability of the owner, or for the possible existence of future estates. To cover possible disability, a period of thirty years is sufficient, but the right of a future owner may be preserved by a

previous life interest for a still longer period, and when the nature of the outstanding title is not known, it is impossible to say with certainty at what date it is extinguished. In *E. p. Chamberlain (supra)*, Bacon, V.-C., relied upon sect. 79 of the Lands Clauses Act, 1845, as showing that the possessory title must be taken to be good in twenty (now twelve) years, unless it is shown that the true title is not in fact barred; but the section does not seem to apply where the possessor has merely an inchoate title at the time the land is taken, and moreover, it requires that he should be in possession as owner. In *Gedye v. Commissioners of Works (supra)*, it was observed that a lessee holding over was not in possession as owner, and on this ground *Ex parte Chamberlain* was doubted. But even though sect. 79 may not apply, it seems that the possessor must be entitled to the purchase-money as soon as he can show that the real owner is barred, and when this is to be deemed to have happened must depend on the particular circumstances of each case. It may be surmised, that in cases where the title is shown to be merely a title under the statute, and nothing is known as to the state of the true title, the Court would not ordinarily part with the money simply on the ground of the lapse of twelve years. The uncertainty attaching to titles under the statute will be considered more fully in the next chapter.

Limited
estate
under
possessory
title.

If a testator devises land, in which he has either no devisable interest at all, or in which he has merely an inchoate possessory title under the statute, to one for life with remainder over, and the tenant for life enters, his possession will be referred to his title under the will, and persons claiming under him will not be allowed to dispute the right of the remainderman. In *Board v. Board* (1873, L. R. 9 Q. B. 48), Robert Amesbury, being tenant by the curtesy of certain premises, devised them to trustees for his

daughter Rebecca for life, with remainder to his grandson William. On the death of the testator Rebecca entered into possession, and was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. William conveyed his remainder to the plaintiff. Rebecca, after the twenty years had elapsed, conveyed to the defendant in fee, and upon her death he took possession. The plaintiff, as assignee of William, brought ejectment, and it was held that the defendant was estopped from disputing his title. "The question is," said Blackburn, J., "whether Rebecca, having taken under the will which gave her an estate for life, is not estopped from saying that, as against William or the person claiming under him, the will, under which she came in as tenant for life and William was remainderman, is void . . . and that the heir-at-law is entitled to the land, and as twenty years have run against his title he is barred, and she, having acquired the fee by twenty years' undisturbed possession, can prevent William from taking under the will. Rebecca claimed under the will, and retained possession under the will, and she, as against everybody interested in the will, is estopped from denying its validity. The case is like that of a tenant coming in under a landlord; and he is estopped from denying his landlord's title." (Cf. *Hawksbee v. Hawksbee*, 1853, 11 Hare, 230.) *Anstee v. Nelms* (1856, 1 H. & N. 225) seems to show that the same principle applies where, although the land is not in fact devised by the will, the tenant for life believes that it is and enters accordingly. "My impression is," said Martin, B., "(if it were necessary to decide the point) that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give to his heir a right against the remainderman." In that

case the land in question was held to have passed under the will, and the testator was in fact entitled to it; hence, the present question did not arise. But the principle was applied in *Kernaghan v. McNally* (1861, 12 Ir. Ch. R. 89), where *cestui que trusts* entered upon land under a devise in trust which was ineffectual by reason of the land having been acquired by the testator after the date of the will. It was held that they were estopped from disputing the title of the remainderman, and further, that under the estoppel the legal estate was to be regarded as vested in the devisees in trust. On the other hand, in *Paine v. Jones* (1874, L. R. 18 Eq. 320), where a devise was ineffectual for similar reasons, Malins, V.-C., decided that the tenant for life acquired the fee for himself on the ground that he had no title under the will. The question is one of some difficulty, but it seems safer to say, in accordance with the opinion expressed in *Anstee v. Nelms* (*supra*), that the estoppel applies whenever a tenant for life enters claiming under a will, whether the land is actually devised by the will or not.

Title by
receipt of
rent:
i. As
regards
owner.

Where land is in the occupation of a tenant, and a stranger, wrongfully claiming to be entitled, is in receipt of rent, his acquisition of title depends upon two points, the extinction of the title of the lawful reversioner, and his own right to enforce payment of rent from the tenant, and ultimately to recover possession from him. As to the lawful reversioner there are three cases. In tenancies from year to year, without lease in writing, the statute runs against him from the last receipt of rent by him (sect. 8 of the Act of 1833); in leases in writing at a rent of 20s. or upwards, the statute runs from the first wrongful receipt of rent by the stranger (sect. 9); in leases in writing at a less rent, it does not run till the determination of the lease. The first two are the important cases. From the

last receipt of rent by the true owner in the first, and from the first receipt of rent by the stranger in the second, the statute runs. At the end of twelve years the true owner's right of action is barred, and his title is extinguished.

In the meantime, what is the stranger's position as regards the tenant? Does the receipt of rent entitle him to rank as owner? *Primâ facie* the payment of rent to him is evidence of his title, and this title the tenant is not, under ordinary circumstances, at liberty to dispute. But he may dispute it if the payment has been obtained from him by fraud or misrepresentation. (*Doe v. Wiggins*, 1843, 4 Q. B. 367; *Williams v. Bartholomew*, 1798, 1 B. & P. 327; *Doe v. Brown*, 1837, 7 A. & E. 447.) And to save himself from becoming liable to pay rent twice over, he may explain the circumstances under which the payment was made, and that the person to whom it was made was not entitled. (*Fenner v. Duplock*, 1824, 2 Bing. 10; *Doe v. Francis*, 1837, 2 Moo. & R. 57; *Cornish v. Searell*, 1828, 8 B. & C. 471.) It is assumed that the person to whom the payment of rent is made, and whose title is nevertheless allowed to be disputed, is not the person from whom the tenant received possession, or, if he is, that the title which he then had has expired. (Cf. *Hall v. Butler*, 1839, 10 A. & E. 204.) In *Rogers v. Pitcher* (1815, 6 Taunt. 202), it was held that, though payment of rent to A. was *primâ facie* evidence that he was owner of the land, yet, if the tenant did not originally take from him, the presumption was liable to be rebutted by proof of circumstances showing that A. was not entitled to the rent, and that it had been paid without sufficient ground.

Moreover, the tenant, at the time he makes the payment, must be ignorant of the defect in the title of the alleged landlord. In *Gregory v. Doidge* (1826, 3 Bing.

ii. As
regards
tenant.

474), the plaintiff had been tenant under A. A. died, and the defendant and another person each claimed to be his heir-at-law. The defendant procured from the plaintiff a payment on account of rent, and entered into an agreement to set off against the rent the price of some pasturage which he required. The plaintiff was ignorant of the dispute as to the title. The Court was clearly of opinion that as he had come into possession under a former owner, and had entered into the agreement in ignorance of the defect in the defendant's title, he was at liberty to show that the defendant was not his landlord. (See too *Claridge v. Mackenzie*, 1842, 4 Man. & Gr. 143.)

Tenant
must show
jus tertii.

But the above principle is subject to the qualification that the tenant must be able to show that another person is entitled to receive the rent. In *Cooper v. Blandy* (1834, 1 Bing. N. C. 45), which was an action of replevin, it appeared that the plaintiff and his two predecessors in the occupation of the premises had paid rent to Blandy, but at the trial of the action Blandy produced a deed which showed that he was a stranger to the original lease, and it was argued that this put him to proof of his title. But it was held that the plaintiff was estopped from disputing it. "In *Rogers v. Pitcher*," said Tindal, C.J., "it was held that under some circumstances [payment of rent] may not be an estoppel. But it is not pretended here that any other person is entitled to the rent, and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called upon to say he has none. Before calling on us to come to any such conclusion, the plaintiff should at least show that he paid the rent to the defendant by mistake, and that some other person is entitled to receive it." And Park, J., after referring to *Rogers v. Pitcher*, *Fenner v. Duplock*, and other cases, said: "In those cases the title of the lessor

had expired and other persons were entitled to the rent. Here the rent has been paid constantly to the same person, and no other has put in any claim. It is a bare case of a tenant who has paid rent to the only person who claims to be landlord." In *Knight v. Cox* (1856, 18 C. B. 645) payment of rent under distress was held not to be conclusive of title in the distrainor, and evidence was admitted of actual title in a third person.

The effect of payment of rent to a person without title was considered by Cave, J., in *Carlton v. Bowcock* (1884, 51 L. T. N. S. p. 659), and upon discussion of the authorities the law was stated in accordance with the conclusions arrived at above. In 1869 Watson, who was seised in fee of a house and shop, let them to the defendants for a term of five years at 75*l.* a year. In 1872 Watson died, having by his will devised the property to the plaintiff, whom he also appointed his executor. During Watson's life certain agents had been employed by him to collect the rents of this and other property. They continued to do this after his death, and from 1872 to 1874 they accounted for the rents to the plaintiff. In 1874 the plaintiff endeavoured to sell some freehold property devised to him by Watson, and upon the investigation of the title the objection was taken that the will had not been properly executed. Thereupon the agents ceased to account any longer to the plaintiff. Certain rents already received they retained, and they made no further demands on the tenants. No other person claimed the rent from them, and in fact they did not pay any at all. Ultimately the action was brought to recover from the tenants six years' arrears. Cave, J., said that the authorities supported the following conclusions:—" (1) That where a person claiming to be assignee of the reversion obtains payment of rent from the tenant by fraud or misrepresentation, such payment is no

*Carlton v.
Bowcock.*

evidence of title, but that receipt of the rent is *primâ facie* evidence of title where there is no such fraud or misrepresentation; (2) that where rent is paid by the tenant under such circumstances as to amount to *primâ facie* evidence of title, the person receiving the rent is in as good a position as if he were actually in possession; and that, although it is open to the tenant to prove, if he can, that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion, yet he must show such a title in that third person as would entitle him to a verdict in ejectment, and that it is not enough to show that the person to whom the rent was paid has no title, his receipt of the rent being sufficient until a better title is shown." Or, as Cave, J., also said: "No case is to be found in which the tenant has been allowed to pick holes in the title of the person to whom he had paid rent, without showing a better title in anyone else." He held, accordingly, that the plaintiff was entitled to succeed. It thus appears that adverse possession by receipt of rent confers a good title so soon as the statute has run, both against the former owner and the tenant; but during the currency of the statute the tenant may at any time resist further payment of rent by showing the true owner's title, and that up to that time the rent has been paid by mistake.

Encroachment by tenant.

It remains to consider the special rules governing the case of encroachments by a tenant. "It is clearly settled," said Parke, B., in *Doe v. Rees* (1834, 6 C. & P. p. 610), "that encroachments made by a tenant are for the benefit of his landlord, unless it appear clearly by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent." This passage was cited with

approval in *Doe v. Tidbury* (1854, 14 C. B. p. 325), where, as well as in *Doe v. Jones* (1846, 15 M. & W. 580), the rule was applied to an inclosure made by a lessee for life. It was once objected by Lord Kenyon (*Doe v. Mulliner*, 1795, 1 Esp. 460), that this makes the landlord a trespasser; and instead of describing the encroachment as made directly for the benefit of the landlord, it has been thought better to say that the tenant is estopped from disputing the title to the encroachment as much as to the rest of the holding (per Campbell, C.J., in *Andreus v. Hailes*, 1853, 2 E. & B. p. 353); or that the encroachment is annexed to the holding. (Per Parke, B., and Alderson, B., in *Kingsmill v. Millard*, 1855, 11 Exch. pp. 315, 318.) In any case the result is the same, and in *Whitmore v. Humphries* (1871, L. R. 7 C. P. 1), Willes, J., in a statement of the principle quoted by Cotton, L.J., in *Att.-Gen. v. Tomline* (1880, 15 Ch. D. p. 160), said:—“By the rule of law applicable to this subject the landlord is entitled at the determination of the tenancy to recover from the tenant, not only the land originally demised, but also any land which the tenant may have added to it by encroachment from the waste, such encroachment being deemed to be made by him as tenant as an addition to his holding, and consequently for the benefit of his landlord, unless it is made under circumstances showing an intention to hold it for his own benefit alone, and not as part of his holding under the landlord.” And he stated the reason of the rule as follows:—

“The rule is based upon the obligation of the tenant to protect his landlord’s rights, and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it. There is often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his

landlord's, and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments, should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively. The result is to avoid questions which would otherwise frequently arise as to the property in land, and to exclude persons who have come in as tenants, and who are likely to encroach, from raising such questions." It is doubtful whether the doctrine applies to encroachments by a copyholder so as to make the land thus taken part of the copyhold tenement. (*Att.-Gen. v. Tomline*, 1880, 15 Ch. D. 150.)

Inclosure
at a dis-
tance from
demised
premises.

The rule applies, not only where the land inclosed is adjacent to the demised premises, but where it is situated at a distance (per Parke, B., in *Kingsmill v. Millard*, 1855, 11 Ex. 313), provided the distance is not so great that the tenant must be presumed to have inclosed for his own benefit. "It is not necessary," said Willes, J., in *Earl of Lisburne v. Davies* (1866, L. R. 1 C. P. p. 268), "that the encroachment should be conterminous with the holding. It is enough if it is so near that by reason of its nearness the tenant gained the opportunity of making it, and the landlord might have tacitly acquiesced in it." Hence, where there was nothing but a river and a strip of waste land between the demised premises and the inclosure, it was held that the distance was not a circumstance to rebut the ordinary presumption; and so, too, in *Andrews v. Hailes* (1853, 2 E. & B. 349), where only a road intervened.

Subse-
quent
severance.

And though it is said that the intention of the tenant to inclose for himself must be shown at the time, this does not seem to preclude a subsequent severance of the

inclosure from the demised premises. "Even though," said Parke, B., in *Kingsmill v. Millard* (1855, 11 Ex. p. 318), "at the time of making the encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from his farm; for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding. But if the landlord is allowed to remain under the belief that the encroachment is part of the farm, the tenant is estopped from denying it, and must render it up at the end of the term as a portion of the holding." And so where a conveyance in fee is made by the tenant, but the deed is not delivered and possession under it is not taken, this cannot prejudice the landlord's claim. (*Doe v. Jones*, 1846, 15 M. & W. 580.)

The presumption that the land inclosed is added to the holding arises also where the land belongs to the landlord, and it is immaterial that he has assented to the encroachment. This does not make the tenant tenant at will of the inclosed portion, so as to enable him to gain a title under sect. 7 of the Real Property Limitation Act, 1833. "The fact," said Willes, J., in *Whitmore v. Humphries* (1871, L. R. 7 C. P. p. 6), "that the landlord knows that the tenant is encroaching on his land, and from good nature takes no notice, and does not turn the tenant out, but allows him to hold the encroachment on the same terms as if it had been part of the holding, cannot, in good sense, put the landlord in a worse position than if the tenant had taken originally without any assent, and by mere wrong unknown to his landlord." On the other hand, in *Doe v. Massey* (1851, 17 Q. B. 373), the owner of plots A. and B., who had demised A. to

Encroachment on other land of lessor.

Massey for building, expressly refused to grant him a lease of B. or to give permission to build on it, telling him that if he built there, he must build on his own responsibility. Subsequently, Massey built on B., the owner not interfering and never receiving any rent in respect of B. It was held that the presumption was rebutted, and that B. was not to be regarded as added to the demised premises.

Lease subsequent to possession of adjoining land.

And where a person is in possession of land under such circumstances that the statute is running in his favour, and then takes a lease of adjoining land belonging to the same owner, this does not alter the character of his previous possession so as to raise the presumption that the land which he was occupying as his own he afterwards occupies as part of the demised premises. (*Dixon v. Baty*, 1866, L. R. 1 Ex. 259.)

CHAPTER XI.

TITLE BY POSSESSION.

IN the previous chapter an attempt has been made to state the rules for the operation of the Real Property Limitation Acts, and to explain the nature of a possessory title both before and after the bar of the statute is complete. Before the statute has fully run, the possessor, if he is a disseisor, and possibly if he is not, has a title which is good against all the world except the true owner; after it has run, he is in general the absolute owner—that is, he is seised in fee with an indefeasible title—though, by estoppel, the fee held under the new title may be divided into successive estates. But unless the circumstances of the previous title are known, there is no point of time at which it can be said with certainty that the change from the defeasible to the indefeasible title has taken place.

Title by
adverse
possession.

This uncertainty in possessory titles distinguishes the English law of the limitation of actions from the Roman law of prescription. In the Roman law, a possessor who claimed that his possession had ripened into ownership by usucapion or prescription, had all the matters requiring proof within his own cognizance. He had nothing to do with the title of the former owner. He proved his own possession, and further that he had acquired possession by lawful title and in good faith—that is, in the belief that the ownership had become by such title vested in him. At the end of the term of two years in usucapion, of ten or twenty years in prescription, he knew that he had become

Certainty
of title by
prescription.

the owner, whatever defect there might happen to be in his title. This was in accordance with the design of usucapion, which was to perfect the title of the *bonâ fide* possessor.

Uncertainty of title by limitation.

The Statute of Limitations in English law is at the same time wider and less certain in its operation. It is wider because it imposes no condition on the possessor as to the character of his possession, or as to the mode in which he has acquired it. It is not confined to the possessor who has entered by title and in good faith. It is less certain, because it only confers a title on the new possessor indirectly by extinguishing the title of the previous owner, and this extinction of title depends upon circumstances which may be quite unknown to the possessor. The person who is in possession of land knowing that he himself is not entitled, but without recognizing any other title, may in ordinary cases be sure that the statute is running in his favour; but in order that he may be able to predict with certainty when his possessory title will be safe, he must be aware of the facts which determine how the statute operates against the previous title.

In English law all title rests on possession.

But the cases in which a possession is known to be adverse, and in which the possessor relies entirely on the Statute of Limitations to complete his title, are rare. In English law all titles—apart from the case of registration of title presently to be noticed—rest ultimately on possession, and the nature of the title is not altered by the fact that the present possession under it has been acquired by some recognized mode of transfer or devolution. Such change of possession from one person to another, all holding under the same title, may have gone on for centuries, and, if this is known, the title is clearly indefeasible. In the majority of cases, however, the title cannot be carried back for more than a comparatively short period, and the

real guarantee of safety is the probability that any outstanding rights there may have been are barred. The following remarks, therefore, apply to titles generally, and not merely to titles which are known to have their origin in adverse possession.

The circumstances under which the bar of the statute may be postponed beyond the ordinary period of twelve years will be gathered from what has been said in the previous chapter. They are the existence of future estates, including reversions upon long terms, the disability of the owner, and the preservation of a mortgage by payment of interest. The bar of the statute is also postponed in cases of concealed fraud and express trust, but these do not affect a *bonâ fide* purchaser for valuable consideration.

Causes of
uncer-
tainty of
title.

As to one class of future estates—remainders after estates tail—and as to disabilities, important changes in favour of possessory titles were made by the Real Property Limitation Act, 1833. Under the old law a remainder after an estate tail ranked, for the purpose of the statute, as an independent future estate. Hence a possession might, for an indefinite time, be adverse to an estate tail, and yet, upon ultimate failure of the issue in tail, the remainderman would be entitled to recover. (Hayes' Conv. I. 258.) Under the present law, when time is running against the tenant in tail, it is also running both against the issue and the remaindermen. Consequently an estate tail has no special effect in postponing the operation of the statute. If the tenant in tail is entitled in possession, it is the same, so far as an adverse possessory title is concerned, as though he was tenant in fee; if he is entitled in remainder, a like result follows so soon as his estate falls into possession. As to disability, a maximum period of thirty years is allowed under the Act of 1874 in the case of a claimant under disability at the time when his right of entry accrues; while, if such claimant dies under disability, no

extension is allowed on the ground of the disability of any other person.

Life
estates.

But a possessory title is still liable to be defeated in consequence of the bar of the statute having been postponed by the existence of a life estate or of an executory limitation. The indefinite continuance of this source of danger is prevented by the rule against perpetuities, which accordingly has been described as "one of the strongholds of a purchaser's security." (Jarm. Conv. IX. 418.) In one form the rule forbids the limitation of any estate to the unborn child of an unborn person; in another, it requires that the power of disposing of the fee shall not be postponed beyond a life or lives in being and twenty-one years after, with an allowance for possible gestation. (*Whitby v. Mitchell*, 1890, 44 Ch. D. 85.) And a further check has been placed on executory limitations by sect. 10 of the Conveyancing Act, 1882. But the existence of a previous life estate, or the postponement of an executory devise till a date subsequent to existing lives, may render an adverse title insecure for very many years. There is a case on record (Hayes' Conv. I. 290, n. (s)) where an abstract showed a title derived under a feoffment in fee more than sixty years old. A reported case, however, disclosed the fact that the feoffor was tenant for life only. An objection was taken to the title, and, during the discussion, several claimants started up, and an ejectment was brought for the recovery of the estate. And sixty years, of course, does not represent the extreme limit. "I have known an instance," said Mr. Brodie, in advising whether the effect of the Real Property Limitation Act, 1833, was to modify the rule requiring a sixty years' title (Hayes' Conv. I. 566), "of a person being tenant for life for more than eighty years. Such a person might have been dispossessed at the time when his right first accrued. An adverse possession to him during the whole period of

his life would not have made a good title against the remainderman or reversioner under the old law, nor will it do so under the new law."

A long lease may be a lease either for lives or for a term of years. In either case the effect in postponing the reversioner's right to possession is the same. During the currency of the lease, an adverse title may be gained by receipt of rent from the lessee, but in the absence of such receipt—if, for instance, a stranger merely goes into possession—the reversioner's right is not affected. In the case of a lease for lives, the period during which a possessory title remains insecure is limited by the possible duration of human life in the same manner as where there is an ordinary estate for life, save that the lives in such a lease are usually selected so as to cover as long a period as possible. In the case of a lease for a long term of years, there seems to be no limit to the period during which a possessory title may continue to be non-adverse to the reversioner.

The danger in question is illustrated by the case of *Ecclesiastical Commissioners v. Tremer* (1893, 1 Ch. 166). In 1805, R., being seised in fee of certain lands, granted a lease for three lives. In 1807, the tenants under the lease of 1805 granted a sub-lease of part of the property for ninety-nine years, determinable on the dropping of the same lives as in the head lease. The last of these lives dropped in 1874. In 1832, the persons then entitled to the lease of 1805 surrendered it to R. and took a fresh lease for three lives. The last of these lives dropped in 1891. The plaintiffs, who claimed through R., had ever since the death of R., in 1839, received the rent reserved by the lease of 1832. In 1825, the residue of the sub-term created in 1807 became vested in C., who died in 1838, and in 1871 the persons entitled to the lands under

Long
terms.

*Ecclesiastical Com-
missioners
v. Tremer.*

the will of C. put them up for sale by auction, purporting to sell as owners in fee. The lands were sold to W. and conveyed to him in 1872. The defendants claimed through W. It was argued on their behalf that the plaintiff's right of entry accrued in 1874, but, in accordance with what has been said above (*ante*, p. 239), the effect of the granting of the new lease in 1832, while possession was being held under a valid underlease, was to preserve the title of the reversioner until the expiry of the new lease, that is, until 1891. Consequently, the plaintiffs recovered. In this case the owners of the land had been actually in receipt of rent for the whole term of the lease, and no neglect, therefore, was attributable to them. But the result would have been the same although rent had not been received by them, provided it had not been received by anyone else.

Mort-
gages.

As already shown (*ante*, p. 258), a mortgage on land may be kept alive by payment of interest, although the payment is not made by the person in possession, and this forms a further source of danger to possessory titles.

Rule
requiring
sixty
years'
title.

Previously to the passing of the Real Property Limitation Act, 1833, it was the rule that, in the absence of special stipulation, a vendor was bound to show at least a sixty years' title; while, if the title thus shown raised a doubt as to the earlier title, he had to carry the title back still further so as to remove the doubt. (Hayes' Conv. I. 571; Sugden's Vendors & Purchasers, 14th edit. 366.) Upon the passing of the Act of 1833 it was a matter of great controversy whether the effect was to shorten this period of sixty years. Those who favoured a change in the rule urged that the writ of right, with its limitation of sixty years, had been abolished, and the security of possessory titles had been also increased by the provisions relating to estates tail and disabilities. On the other

hand, it was argued that the period of sixty years did not depend on the limitation in a writ of right; that the danger arising from the possible existence of life estates still remained; and that sixty years was not too long a period to afford protection against this. (Hayes' Conv. I. 280; Jarm. Conv. IX. 417.) In the result it was assumed by conveyancers that the rule was not altered, and a decision to this effect was given by Lord Lyndhurst, C., in *Cooper v. Emery* (1844, 1 Phil. 388).

It is clear, from what has been said above, that the date at which it may be known that a title has become indefeasible depends only slightly upon the period of limitation. The chief element of uncertainty lies in the possible existence of future estates, and against this possibility even a sixty years' title gives no sure guarantee. It is merely a matter of probability, and when this is once admitted—when, that is, it is recognized that no purchaser is entitled to more than a probable title—the degree of probability may be varied in the interest of vendors and purchasers generally. But, for practical purposes, it is agreed that a forty years' title affords reasonably sufficient security, and, with a view to the shortening of abstracts, forty years was, by the Vendor and Purchaser Act, 1874, substituted for sixty years as the period for which title must be shown. Even this period is usually further diminished—very often greatly diminished—by special conditions of sale, and it is said that such conditions do not have any appreciable effect in keeping away purchasers. Such titles, of course, are not merely possessory. They usually commence with a transaction—a purchase or a mortgage—which raises a presumption that, at the date of the transaction, the title was examined, and it is upon this presumption that the purchaser mainly relies.

Substitution of forty years for root of title.

So far we have treated title to land as resting Registra-

tion of
title.

ultimately upon possession, and as secured against adverse claims—rendered indefeasible, that is—by the operation of the Statute of Limitations. But under a system of registration of title which guarantees the title to be indefeasible, the title rests, not upon ancient possession, but upon the entry in the register, and it is important to consider whether this excuses the owner from the necessity of supporting his title by present possession, or whether he still remains liable to have it extinguished by the operation of the Statute of Limitations.

Land
Transfer
Act, 1875.

The Land Transfer Act, 1875 (38 & 39 Vict. c. 87), distinguishes between titles according as they are absolute, qualified, or possessory. Theoretically an absolute, or indefeasible, title must commence from a period sufficiently remote to exclude any probability of adverse claims, and starting from that point, it must be strictly deduced down to the present time. A person who can show such a title is the true owner, and he is entitled to be registered as proprietor with an absolute title. If he cannot carry the title back sufficiently far, or if there are any difficulties arising upon a specified instrument or otherwise in his chain of title, a saving may be entered on the register in respect of interests arising before the commencement of his title, or upon such instrument or in some other specified manner in the course of his title, and he is then said to be registered with a qualified title. (Sect. 9.) It ranks as an absolute title save in so far as concerns the claims and interests expressly saved. But the experience of the working of the Land Registry Act, 1862, showed that to insist on the theoretical requirements of an indefeasible title would be fatal to the adoption of registration, and the Act of 1875 permits the registrar, either on his own responsibility or with the sanction of the Court, to accept a good holding title for registration as absolute (sect. 17), while by rule

2 (d) of the Land Registry Rules, 1889, he is permitted to have regard to the fact that the title has recently undergone examination on the occasion of a dealing for value. If an apparent owner desires to dispense with proving his title altogether, he can be registered as proprietor with a possessory title, and trust to the Statute of Limitations to render his title indefeasible by the lapse of time.

It is sometimes assumed that a system of registration of title is incompatible with the acquisition of title by possession, or at any rate that its tendency is to rid the law of the doctrines of possession and usucapion. This view was forcibly expressed by Sir Henry Maine: "It is very remarkable," he says (*Early Law and Custom*, p. 356), "that where there is a perfect system of land registry, the strong tendency is to revert to the doctrines of Roman law as it must have been before possession, usucapion, and bonitarian ownership grew up. The registry of the sale or mortgage of land being extremely easy, expeditious, and cheap, there is a marked disposition among the authors and expositors of law to say to the members of the community, 'Either register your transfers or mortgages, or cause them to be registered, or you shall have no rights whatever. If you neglect doing that which is in your power to do at any moment, and at a trifling cost in time and money, you shall not have the benefit of possession, of bonitarian ownership, or usucapion or prescription.' The expedient of public registration is, it will be seen, purely mechanical. A contrivance, very like it in principle, spontaneously and very early suggested itself to the human race. Nevertheless, where a public registry of mortgage and land transfer has been established, some of the most famous and luxuriant branches of law show a tendency to dwindle and wither away under its shadow."

Effect of
registra-
tion on
title by
possession.

This passage appears to refer to a registry of deeds Roman
law in this

respect no
guide for
English
law.

rather than to a registry of title; but whatever may be its scope, it is written with special reference to the doctrines of the Roman law, and possession and usucapion in that system are completely different from the corresponding institutions in English law. In Roman law, possession is not by itself a source of title; usucapion and prescription avail only for the *bonâ fide* possessor. In English law, possession is a source of title, and the Statute of Limitations, in perfecting the title, pays no regard to the honesty of the possessor. It is conceivable that, in two systems so distinct, registration of title would not necessarily have the same results. There can be no *bonâ fide* possession, such as is required by the Roman law, so soon as the title of the true owner has been placed on the register and published to the world; and it is natural, therefore, that registration of title should put an end to the acquisition of ownership by usucapion or prescription. But in English law the object of registration is attained when the true owner is enabled to prove his title by the entry on the register, and it is no essential feature in the system that he should be excused from the necessity of asserting that title within a reasonable time. *Primâ facie*, it might be supposed that the statute would run against him if he was out of possession, and that in due time his title would be extinguished. The adverse title would thereupon become indefeasible, and would be substituted for the former title on the register.

Land
Transfer
Act, 1875,
s. 21.

But any such substitution of an adverse title is prohibited under the existing system of registration by sect. 21 of the Land Transfer Act, 1875, which provides that, "a title to any land, adverse to or in derogation of the title of the registered proprietor, shall not be acquired by any length of possession," with a saving for the case of registration of a possessory title when the person who thus becomes

registered proprietor is not, at the date of registration, in possession. And it is usually assumed that the section does more than prohibit the entry of an adverse title on the register; that it excludes altogether the operation of the Statute of Limitations so soon as there is a proprietor on the register with an absolute title.

It does not seem to be clear, however, that sect. 21 necessarily goes as far as this. In terms it only prohibits the acquisition of an adverse title. But the Real Property Limitation Acts are silent as to the acquisition of title. They are concerned only with barring the true owner's remedy and extinguishing his title. The indirect effect certainly is to confer a title on the adverse possessor; but if a registered proprietor, after the statutory period has elapsed, seeks to recover the land in ejectment, the possessor does not rely upon such title, he simply pleads the statute. The proprietor has not entered within the twelve years, and his right of entry is barred. It is possible that the section does not interfere with this result, that it does no more than prevent the possessor from obtaining registration in respect of the title indirectly conferred upon him. If this is so, there is a separation between the right of property and the right of possession, such as was possible under the old law. The registered proprietor, in spite of sect. 34 of the Real Property Limitation Act, 1833, seems to retain the right of property, but he has no right of possession; and since ejectment is a possessory action, and depends on the right of entry, and the English law recognises at the present time no proprietary action, he has no means of asserting his title. The result is that the land will thenceforth be dealt with under the possessory title, as though it was not on the register.

Assuming, however, that sect. 21 has a wider effect, and

Value of
possession

as an aid
to title.

that it does exclude registered titles from the operation of the Statute of Limitations, it may be useful, in view of attempts at the extension of the system of registration of title, to point out that the expediency of the enactment is very doubtful. In some respects registration of title may make the Statute of Limitations less essential. The statute no longer forms the ultimate security of every title. Titles are indefeasible because they appear on the register, and not, as under the present system, because the statute has barred any adverse claims there may formerly have been. But it is still valuable on other grounds. Unclaimed funds may safely be left to accumulate in Chancery; but it is not for the public interest that unclaimed lands should remain unoccupied. In the absence of the true owner a mere stranger may enter, but more probably it will be some member of the family who has a claim which may properly be sanctioned by the lapse of time; and even a mere stranger, by keeping the land in cultivation or spending money on it, may not unreasonably be protected against the return of a negligent owner. There will be cases, too, where possession may usefully cure defects of title arising upon an informal conveyance or devise, and even the Land Transfer Act itself, in refusing to make the register conclusive as to boundaries (sect. 83 (5)), leaves the area of the registered land to be settled by possession. The principle of sect. 21, accordingly, has from various quarters received adverse criticism. (See Article, "Thoughts on Registration of Title," 38 Sol. Journ. 4; Brickdale, *Registration of Title*, p. 56; Pamphlet on Land Transfer, issued by Bar Committee, 1886, p. 57.)

Suggested
preserva-
tion of
Statute
of Limi-
tations.

The better plan appears to be to make the system of registration of title work in conjunction with the Statute of Limitations. If an owner wishes to preserve his title, he ought, as now, to assert it within the statutory period. If

he fails to do this, he is punished for his negligence by the extinguishment of his title. At the same time a new title is conferred on the possessor, and it should be possible to procure the substitution of this on the register. The register would thus be rectified from time to time so as to accord with the actual possession, while, if no such rectification were possible, much difficulty would arise in the event of the long continued absence of the registered owner. Under this plan, moreover, registration of title produces its proper effect, while it does not interfere with the fundamental principles of English law. Registration is evidence of title, and a claimant to land, who can prove his title from the register, requires no other proof. But possession still remains the source of a right of possession, which entitles the possessor to rank as the owner against strangers, and which, in course of time, if the true owner fails to assert his title, will ripen into ownership.

APPENDICES.

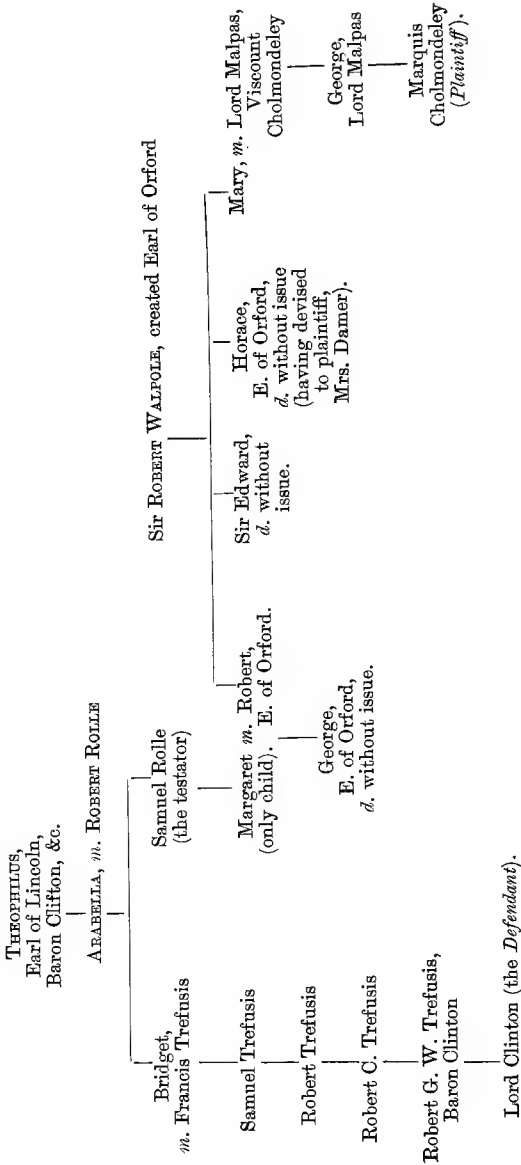


I.—PEDIGREE IN *CHOLMONDELEY* v. *CLINTON*.

II.—STATUTES.

APPENDIX I.

PEDIGREE IN *CHOLMONDELEY* v. *CLINTON* (*ante*, p. 168).



APPENDIX II.

STATUTES.

[The figures in the margin refer to the pages in the text.]

REAL PROPERTY LIMITATION ACT, 1833

(3 & 4 WILL. 4, c. 27).

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24th July, 1833.]

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or

Meaning of the words in the Act.

"Land."

"Rent."

Person through whom another claims.

ps. 185, 230

p. 188

p. 183

general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

2. [*Repealed and replaced by R. P. L. Act, 1874, s. 1.*]

3. And be it further enacted, that in the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the

"Person."

Number and gender.

When the right shall be deemed to have accrued:

in the case of an estate in possession;

on dispossession;

on abatement or death;

on alienation;

in case of future estate;

ps. 193-210

p. 210

p. 210

p. 211

possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

p. 212 in case of forfeiture or breach of condition.

p. 212 4. Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

5. [*Repealed and replaced with additions by R. P. L. Act, 1874, s. 2.*]

6. And be it further enacted, that for the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

An administrator to claim as if he obtained the estate without interval after death of deceased.

ps. 232-234 7. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

In the case of a tenant at will the right shall be deemed to have accrued at the end of one year.

p. 219 ps. 234-236 8. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

Where rent amounting to 20s., reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

A mere entry not to be deemed possession.

No right to be preserved by continual claim.

Possession of one coparcener, &c. not to be the possession of the others.

Possession of a younger brother not to be the possession of the heir.

Acknowledgment in writing given to the person en-

the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

9. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled. ps. 239-241

10. And be it further enacted, that no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon. p. 265

11. And be it further enacted, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action. p. 265

12. And be it further enacted, that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them. p. 181

13. And be it further enacted, that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir. p. 181

14. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in p. 247

writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

titled, or his agent, to be equivalent to possession or receipt of rent.

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this Act.

Where possession is not adverse at the time of passing the Act, the right shall not be barred until the end of five years afterwards.

16. [*Repealed and replaced by R. P. L. Act, 1874, s. 3.*]

17. [*Repealed and replaced by R. P. L. Act, 1874, s. 5.*]

p. 244

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities herein-before mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of *twenty** years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of *ten** years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

No further time to be allowed for a succession of disabilities.

19. And be it further enacted, that no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this Act.

Scotland, Ireland, and the adjacent islands not to be deemed beyond seas.

* "Twenty" altered to "twelve," and "ten" to "six." (R. P. L. Act, 1874, s. 9.)

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

20. And be it further enacted, that when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

Where tenant in tail is barred, remaindermen, whom he might have barred shall not recover.

21. And be it further enacted, that when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

22. And be it further enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

23. [*Repealed and replaced by R. P. L. Act, 1874. s. 6.*]

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

24. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

- p. 216 25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.
- p. 245 26. And be it further enacted, that in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any holder of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.
- p. 246 27. Provided always, and be it further enacted, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act.
28. [*Repealed and replaced by R. P. L. Act, 1874, s. 7.*]
29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to
- In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.
- In cases of fraud no time shall run whilst the fraud remains concealed.
- Saving the jurisdiction of equity on the ground of acquiescence or otherwise.
- No lands or rents to be recovered by Ecclesiastical or Eleemosynary Corporation Sole but within two incumbencies and six years, or sixty years.

the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December one thousand eight hundred and thirty-three no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

No advowson to be recovered but within three incumbencies or sixty years.

30. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

32. And be it further enacted, that in the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit, shall be limited accordingly.

No advowson to be recovered after 100 years.

33. Provided always, and be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare

impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

- ps. 183, 272 **34.** And be it further enacted, that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished. At the end of the period of limitation the right of the party out of possession to be extinguished.
- p. 232 **35.** And be it further enacted, that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act. Receipt of rent to be deemed receipt of profits.
- p. 106 ***36.** And be it further enacted, that no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisio, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præterit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, Real and mixed actions abolished after the 31st December, 1834;

except for
dower, quare
impedit, and
ejectment.

Real actions
may be
brought until
the 1st June,
1835.

Saving the
rights of per-
sons entitled
to real actions
only at the
commence-
ment of the
Act, &c.

No descent,
warranty, &c.
to bar a right
of entry.

No arrears of
dower to be
recovered for
more than six
years.

No arrears of
rent or interest
to be recovered
for more than
six years.

cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quare servitia, and no other action, real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the thirty-first day of December one thousand eight hundred and thirty-four.*

*37. Provided always, and be it further enacted, that when, on the said thirty-first day of December one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June one thousand eight hundred and thirty-five in case the same might have been brought if this Act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

*38. Provided also, and be it further enacted, that when, on the said first day of June one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this Act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

39. And be it further enacted, that no descent cast, discontinuance, or warranty which may happen or be made after the said thirty-first day of December one thousand eight hundred and thirty-three shall toll or defeat any right of entry or action for the recovery of land. ps. 106, 148, 151

40. [*Repealed and replaced by R. P. L. Act, 1874, s. 8.*]

41. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit. p. 189

42. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no arrears of rent or of interest in respect of any sum of ps. 189, 191

* The words in italics in sect. 36, and also sects. 37 and 38, were repealed by 37 & 38 Vict. c. 35.

money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

43. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual Court to recover the same but within the period during which he might bring such action or suit at law or in equity.

Act to extend to the Spiritual Courts.

44. Provided always, and be it further enacted, that this Act shall not extend to Scotland.

Act not to extend to Scotland.

3 & 4 WILL. 4, c. 42.

An Act for the further Amendment of the Law, and the better Advancement of Justice. [14th August, 1833.]

3. And be it further enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force,

Limitation of action of debt on specialties, &c.

shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, within two years after the cause of such actions or suits, but not after; and the said other actions within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.

Remedy for
infants, femes
covert, &c.

4. And be it further enacted, that if any person or persons that is or are or shall be entitled to any such action or suit, or to such scire facias, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, non compos mentis, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and that if any person or persons against whom there shall be any such cause of action is or are or shall be, at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.

Absence of
defendants
beyond seas
provided for.

Proviso in case
of acknow-
ledgment in
writing, or by
part payment.

5. Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance,

may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

1 VICT. c. 28.

An Act to amend an Act of the Third and Fourth Years of his late Majesty, for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

[3rd July, 1837.]

WHEREAS doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," so far as the same relates to mortgages; and it is expedient that such doubts should be removed: Be it declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within *twenty** years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than *twenty** years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.

3 & 4 Will. 4, c. 27.

Mortgagees of land, being land within the definition in 3 & 4 Will. 4, c. 57, s. 1, may bring actions to recover land within *twenty** years after last payment of principal or interest.

* "Twenty" altered to "twelve." (R. P. L. Act, 1874, s. 9.)

REAL PROPERTY LIMITATION ACT, 1874.

(37 & 38 VICT. c. 57.)

An Act for the further Limitation of Actions and Suits relating to Real Property. [7th August, 1874.]

WHEREAS it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

No land or rent to be recovered but within twelve years after the right of action accrued.

1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

ps. 182,
185, 188,
190, 192

Provision for case of future estates.

2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent: But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined,

ps. 211,
212, 213

Time limited to six years when person entitled to the particular estate out of possession, &c.

p. 211

or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

p. 244 3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiocy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

p. 244 4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

No time to be allowed for absence beyond seas.

p. 244 5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to

Thirty years utmost allowance for disabilities.

be under any such disability, or have died, shall not have expired.

In case of possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twelve years after that period, at which the assurance, if then executed, would have barred them.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail. p. 215

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession or from the last written acknowledgment.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claim- p. 226 ps. 247, 248

ing any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

ps. 189, 191,
241-243

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

ps. 247, 253

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next herein-after mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions herein-before contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the

Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.

Act to be read with 3 & 4 Will. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act.

7 Will. 4 &
1 Vict. c. 23,
to be read
with this Act.

Time for
recovering
charges and
arrears of in-
terest not to
be enlarged by
express trusts
for raising
same.

Short title.

Commence-
ment of Act.

section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

10. After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. p. 243

11. This Act may be cited as the "Real Property Limitation Act, 1874."

12. This Act shall commence and come into operation on the first day of January one thousand eight hundred and seventy-nine.

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